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nov 9
REPORTS OF CASES ³⁷

ARGUED AND DETERMINED IN

^{Arizona}
THE SUPREME COURT

OF THE

TERRITORY OF ARIZONA,

FROM

JANUARY TERM, 1866,

TO

JANUARY TERM, 1884, INCLUSIVE.

F. P. DANN,

REPORTER.

VOLUME I.

SAN FRANCISCO:

A. L. BANCROFT AND COMPANY,

LAW BOOK PUBLISHERS, BOOKSELLERS, AND STATIONERS.

1884.

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Recd. Oct. 15, 1884

LIST OF THE JUDGES

WHO HAVE BEEN APPOINTED FOR THE TERRITORY
OF ARIZONA SINCE ITS ORGANIZATION.

1. WILLIAM F. TURNER, CHIEF JUSTICE. Appointed in 1865.
2. HENRY T. BACKUS, ASSOCIATE JUSTICE. Appointed in 1865.
3. JOSEPH P. ALLYS, ASSOCIATE JUSTICE. Appointed in 1865.
4. HARLEY H. CARTTER,.....
ASSOCIATE JUSTICE.....Appointed in 1867.
5. JOHN TITUS, CHIEF JUSTICE.....Appointed in 1871.
6. C. A. TWEED, ASSOCIATE JUSTICE.....Appointed in 1871.
7. ISHAM REAVIS, ASSOCIATE JUSTICE....Appointed in 1871.
8. DE FOREST PORTER, ASSOCIATE JUSTICE.
Appointed in 1873; reappointed 1877 and 1881;
resigned 1882.
9. E. F. DUNNE, CHIEF JUSTICE.....Appointed in 1875.
10. C. G. W. FRENCH, CHIEF JUSTICE....
Appointed in 1875; reappointed 1880.
11. CHARLES SILENT, ASSOCIATE JUSTICE. Appointed in 1879.
12. W. H. STILWELL, ASSOCIATE JUSTICE. Appointed in 1881.
13. WILSON W. HOOVER.....Appointed in 1882.
14. A. W. SHELDON, ASSOCIATE JUSTICE...Appointed in 1883.
15. DANIEL PINNEY, ASSOCIATE JUSTICE..Appointed in 1883.

UNITED STATES MARSHALS

FOR THE

TERRITORY OF ARIZONA.

EDWARD PHELPS.....	Appointed June 18, 1866.
ISAAC Q. DICKINSON....	Appointed April 15, 1871.
GEORGE TYNG.....	Appointed Jan. 30, 1874.
FRANCIS H. GOODWIN	Appointed Dec. 23, 1874.
W. W. STANDIFER.....	Appointed Aug. 15, 1876.
C. P. DAKE.....	Appointed June 12, 1878.
ZAN L. TIDBALL.....	Appointed July 18, 1882.

LIST OF ATTORNEYS

PRACTICING IN THE SUPREME COURT OF THE TERRITORY OF
ARIZONA FROM ITS ORGANIZATION UP TO THE YEAR 1883.

Able, Paul.
Ainza, Santiago.
Alexander, H. M.
Anderson, James.
Anderson, J. A.
Anderson, N. D.
Aram, E. W.
Baker, A. C.
Bashford, Coles.
Berry, George G.
Berry, W. J.
Bianwell, J. F.
Bruner, A. J.
Buell, James.
Campbell, A.
Cartter, Harley H.
Churchill, Clark.
Churchman, James.
Clark, J. W.
Culver, W. H.
Dann, F. P.
Darroche, J. R.
Davis, A. E.
Davis, D. E.
Davis, J. W.
Dibble, Henry C.
Dobbins, M. D.
Dofficy, Thos. P.
Dorsey, Caleb.
Drum, T. J.
Earll, Warner.

Farley, H.
Fitch, Thomas.
Furgeson, R. D.
Gauche, F.
Goodrich, Ben.
Goodrich, Briggs.
Graves, William.
Gray, Clarence.
Gregg, Frederick W.
Hancock, W. A.
Hargrave, Joseph P.
Haynes, W. M.
Hereford, B. H.
Herring, W. F.
Hicks, John C.
Hodge, Hiram C.
Howard, G. Hill.
Howard, John.
Hoyt, John P.
Hughes, L. C.
Krinchman, James.
Lacy, J. H.
Lemon, A. D.
Leonard, John W.
Lewis, James F.
Lowe, James R.
McCaffry, J. E.
McCarty, O. F.
McClusky, Franklin.
Marsh, Lucius P.
Masterson, Murat.

Mitchell, Thomas.	Smith, Horace.
Morgan, Benjamin.	Smith, Marcius A.
Neugass, Joseph N.	Spalding, G. W.
Noble, Edward.	Stanford, S.
Osborn, W. J.	Stebbins, J. C.
Otis, James W.	Stephens, C. C.
Oury, Granville H.	Stiles, T. L.
Perry, Joseph C.	Street, Webster.
Pomroy, E. B.	Strong, E. D.
Price, Lyttleton.	Struter, O. W.
Reymert, J. D.	Stuart, Charles D.
Risley, E. W.	Summers, H. B.
Robinson, James F.	Thurmond, Philip M.
Robinson, James O.	Turner, P. M.
Robinson, Joseph W.	Tweed, C. A.
Roman, John.	Van Voorhies, W.
Rountree, John M.	Walsh, M. J.
Rowell, C. W. C.	Wells, Ed. W.
Rush, John A.	Wicks, Moye.
Safford, A. P. K.	Williams, George R.
Satterwhite, T. D.	Willis, Henry M.
Scott, Chalmers.	Wordude, P. K.
Silcot, J.	Zabriskie, J. A.
Smith, F. M.	

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REVISED RULES
OF THE
SUPREME COURT
OF THE
TERRITORY OF ARIZONA.

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court, on the first day of each regular term, and on that day only. Persons applying for admission whether upon examination or motion must personally appear in court at the time the application for admission is made. No applicant will be examined unless there shall have been filed with the clerk of the court, before the first day of the term at which the application is made, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such attorneys for at least four years next theretofore, stating in substance that they have, and that each of them has, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them, and each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the character of

the attainments of the applicant, and also, stating that in their opinion the applicant possesses the requisite qualifications in point of learning in the law to be entitled to be admitted to practice.

2. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

3. Ex-members of the supreme court of the territory shall be entitled to admission without motion and without being present; upon application to the clerk of the court the certificate shall be issued to them without the order of the court.

RULE II.

1. The appellant in a civil action shall, within forty days after the appeal is perfected, and the bill of exceptions and statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken.

2. Written evidence of the service upon the adverse party of the transcript shall be filed therewith.

3. The time above limited may be extended by stipulation, but shall not be extended by the court more than forty days; and such extension of time shall be granted only upon good cause shown by affidavit.

4. On or before the calling of a cause for argument, each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

5. When an appeal involves the title to lands or tenements, the attorneys of the respective parties—appellant and respondent—shall, before the argument, place in the hands of the court, written (or, at the option of the party, printed) schedules of the title or deraignment of title, chronologically arranged, upon which they respectively rely; and a failure to comply with this rule may, in the discretion of the court, operate a waiver of the right of the party in default, to orally argue the cause. At the argument the court may order briefs to be filed by counsel for the respective parties; when such order is made the briefs shall be printed, and eight

copies thereof shall be filed within twenty days after the order.

6. In no case will the time for filing briefs be extended.

7. Five days before the day on which a cause shall be set for hearing on the published term calendar, each party shall serve upon the other party, or parties, a printed copy of his points and authorities.

8. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, may, in the discretion of the court, be deemed a waiver by such party of the right to orally argue the cause.

9. Beside the original, there shall be filed eight copies of the transcript, and points and authorities, and statement of facts, which copies shall be distributed by the clerk in the manner following: Two to each of the justices of the supreme court, one to the librarian of the territorial library, and one to the clerk of the court from which the appeal is taken.

10. In criminal causes the written transcript of the record shall be prepared and filed within thirty days after the appeal is taken.

RULE III.

1. If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of the motion is given, or within five days thereafter, and before the hearing of the motion, that fact shall be a sufficient answer to the motion.

RULE IV.

1. On motion to dismiss an appeal, for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said

service appears, the fact and date of filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and, also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

2. On motion to dismiss the appeal on any other ground than the failure to file the transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk of the court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavits.

3. Copies of the moving papers, except the transcript, shall be served with notice of the motion.

4. If an appeal be taken and perfected in the form required by statute, after the expiration of the time limited by law for the taking of such appeal, the respondent may, under the provisions of this rule, move to dismiss such appeal on that ground, whether the time for filing the transcript has expired or not.

5. When an appeal has been dismissed under the provisions of this rule, a certificate of that fact shall be transmitted to the clerk of the court below forthwith, under the seal of this court, unless stayed by an order of the court or three justices thereof.

RULE V.

1. All transcripts of records, briefs, points, and authorities in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the number of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases, or if not printed, shall

be written on one side only, of transcript paper eighteen inches long by ten and one half inches in width, with a margin of not less than one and one half inches wide, fastened or bound together on the left, paged, and prefixed with an alphabetical index, and arranged in the manner prescribed in Rule 6, for civil cases.

RULE VI.

1. The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

2. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.

RULE VII.

1. Whenever a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies.

RULE VIII.

1. No transcript, or other paper or document, which fails to conform to the requirements of these rules, shall be filed by the clerk.

RULE IX.

1. Before the printed transcript, in cases in which a printed transcript is absolutely required, is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party, appearing by different attorneys, on the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a

transcript on appeal, in a civil case, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time, to serve upon the party making the request, a written statement of the particulars in which the transcript is incorrect; or upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the costs of procuring the certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses.

RULE X.

1. The written transcript in civil causes authenticated in the mode prescribed by Rule 9, together with sufficient funds to pay the expenses of printing the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file. Printed copies thereof shall be furnished as provided in Rule 2; and the clerk shall also immediately transmit, by mail or express, copies to the attorneys of the adverse parties, and note such service on the original.

RULE XI.

1. The expense of printing transcripts on appeal in civil causes, and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE XII.

1. For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing,

and, upon good cause shown, obtain an order that the proper clerk certify to this court the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit, showing the existence of the error or defect alleged.

RULE XIII.

1. Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil causes affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and noted in the printed points of the respondent, required to be filed and served under Rule 2, or otherwise notified to the appellant in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.

RULE XIV.

1. Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE XV.

1. One week before the commencement of the term, the clerk shall, unless ordered by the court, place on the calendar all causes which have been continued from the previous term; also, all causes in which the transcripts shall theretofore have been filed. Other causes in which the tran-

transcripts have been filed may be placed on the calendar on the stipulation of the parties. Causes may be placed on the calendar on the motion of the respondent—five days' notice of the motion being given—when the appellant has failed to file the transcript, as prescribed by Rule 2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon by consent, or on the motion of the defendant.

RULE XVI.

1. In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XVII.

1. No more than one counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the court below, may be heard through his own counsel. The counsel for each party will be allowed only one hour, unless an extension of time be obtained from the court before the argument is commenced.

RULE XVIII.

1. All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XIX.

1. No motion for a rehearing shall be permitted in cases in which the remittitur shall have been ordered to be issued. All motions for rehearing shall be upon petition, which, in civil cases, shall be printed. The petition must be filed within twenty-five days after the judgment has been rendered. The time herein prescribed shall not be extended by the court, and the clerk shall not file a petition after such time has expired. The petition shall operate as a stay of proceedings until it has been determined. When it appears that a petition has been filed for delay only, or is frivolous, the court may impose such costs and damages as may be deemed proper.

RULE XX.

1. No remittitur shall issue until after the expiration of twenty-five days from the entry of the judgment or order, unless upon the order of the court, or of three of the justices; provided that when an appeal is dismissed for any cause, the remittitur in case the transcript shall have been filed in this court, shall issue forthwith, unless stayed by an order of the court or three justices thereof; and in case no transcript shall have been filed, then a certificate of dismissal shall be forthwith issued, as provided in subdivision five of Rule 4.

RULE XXI.

1. The proof of service of notice and affidavits, or writ and affidavits, shall be the same as the proof of service of summons in civil cases. After the return day has passed, upon filing due proof of service of notice and affidavits in an application for a peremptory mandate, or of the affidavits and alternative writ, when the alternative writ has been issued, as provided by these rules, and that no answer has been served and filed as herein provided; upon application of the moving party, the clerk shall place the cause upon the calendar for hearing, on the first day of the term, or such other day as may be specially appointed by the court, upon the papers of the applicant; and the application shall be heard upon such papers, unless the court, upon motion on notice and affidavits, shall relieve the respondent from his default, on the ground of mistake, inadvertence, surprise, or excusable neglect, and permit an answer to be filed.

RULE XXII.

1. When a peremptory writ of mandate is awarded it shall issue immediately, unless stayed by special order of court.

RULE XXIII.

1. An appeal or writ of error may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties; and upon and in accordance with such stipulation, the clerk shall enter such dismissal, and the remittitur shall issue thereon in accordance with the terms of said stipulation.

RULE XXIV.

1. When the inspection of an original paper, which was offered in evidence in the court below, is shown to be necessary to a correct decision of the appeal, the court may order the clerk of the court below to transmit such original paper, if in his possession, to the clerk of this court; and if such paper be in the possession of a party to the action, he may produce the same on the hearing of the cause, or he may, upon motion and notice of the adverse party, be required to produce such paper on the hearing of the cause; and in default thereof, the court will intend the paper to be, in all respects, as alleged by the opposite party.

RULE XXV.

1. In any application made to the court for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this court, and not from such other court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings—and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

RULE XXVI.

1. In all cases where notice of a motion is necessary, unless for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days, and one day for every twenty-five miles distant from the point where the motion is to be heard, and between points where there is regular communication by United States mail.

RULE XXVII.

1. When a judgment is reversed or modified, a certified copy of the opinion in the case, if there be any, shall be transmitted, with the remittitur, to the court below.

RULE XXVIII.

1. No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination except upon leaving with the clerk a written receipt therefor.

RULE XXIX.

1. Writs of certiorari may be issued by the clerk, upon the order of any justice of the supreme court, on the filing of a petition therefor, and shall be returnable within thirty days.

RULE XXX.

1. When causes are placed upon the calendar, parties shall be primarily liable for costs, as follows: First, if by the appellant, he shall first be liable; second, if by the respondent, or by consent, then both parties. In civil cases the clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no direction as to costs of appeal, the clerk will enter upon the record and insert in the remittitur a judgment that the appellants recover the costs of the appeal.

RULE XXXI.

1. All causes regularly on the calendar may be brought to a hearing by either party, when called in their order, on the

day for which they are set, or as soon thereafter as they may be reached in the regular call, without further notice than is contained in the apportionment of the calendar by the clerk. When the appellant has failed to file the transcript, as provided by Rule 2, and the cause is put on the calendar on the motion of the respondent, the appeal will be dismissed, or judgment affirmed, in the discretion of the court, on motion of respondent.

RULE XXXII.

1. All applications to this court for peremptory writs of mandate must be noticed for the first day of the term. The notice shall require the respondent to serve and file his answer within the time hereinafter specified, and notify him that if he fails to answer within the time prescribed, the application will be heard on the moving papers, on the first day of the next term. The notice of the application, together with a copy of the affidavit and other papers upon which the application will be based, shall be served on the respondent at least twenty days before the said first day of the term, unless the court or one of the justices shall shorten the time. As soon as practicable after such service, the said notice, affidavit, and other papers, together with the evidence of service, shall be filed by the applicant with the clerk of this court. Within the time mentioned in the notice the respondent shall file his answer, and serve a copy thereof on the applicant or his attorney.

RULE XXXIII.

1. When the application is for an alternative writ, the affidavit upon which the application is made shall be filed with the clerk before the issuing of the writ, and a copy of the same shall be served with the writ. The writ shall command the party to do the act required to be performed, or show cause why he has not done so, by filing his answer thereto within the time specified in said writ, as hereinafter provided, and shall notify the respondent that on failure so to do, the application for the peremptory writ will be heard on the papers of the moving party on the first day of the next succeeding term, or upon such day in term as may be appointed by the court, when a special return day has been

inserted by order of court. The return day specified in the writ shall be twenty days after service of a copy of the writ and affidavit; or, if the court appoint a special return day, then the day so appointed. Within the time so designated for the return of said writ the respondent shall either do the act required to be performed, or file with the clerk his answer to the writ and affidavit, and serve a copy thereof on the applicant.

RULE XXXIV.

1. In proceedings relating to writs of mandate, preliminary motions necessary to be disposed of before the cause is placed upon the calendar for final argument will be heard on the first day of the term.

RULE XXXV.

1. If, in such proceedings, an answer be filed which raises an issue of fact essential to the determination of the application, the question of fact will be directed to be tried by a jury, before some district court, to be designated in the order, or, where the parties so agree, by a referee; and the argument will be postponed till the verdict or finding upon such issue of fact shall be duly certified to this court.

RULE XXXVI.

1. The final argument in proceedings for writs of mandate, whether upon questions of law arising upon the papers in the case, or upon the facts as found by a jury or referee, will be heard on the first Tuesday of the first week of the term, or at such other time as the court may by order direct. A calendar of such causes will be made out for that day, upon which the clerk will place all applications for mandate ready for final hearing. All applications for writs of mandate not ready for hearing on said day (unless for special reasons otherwise directed) will be continued to the next succeeding term of the court.

RULE XXXVII.

1. Cases argued or submitted for decision in term, may be decided, and decision and judgment may be rendered in vacation; and the decision and judgment rendered, by a majority of the justices in vacation, shall have the same force and effect as a decision and judgment rendered by the court, in term; and remittitur shall be issued thereon by the clerk of the court, as upon a judgment rendered in term.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1866.

J. H. DAVIS, RESPONDENT, *v.* JOHN SIMMONS, AP-
PELLANT.

ESSENTIAL LEGAL REQUISITES OF POSSESSORY RIGHT TO PUBLIC LANDS in Arizona, are the intention of the settler to permanently occupy and improve them for his home, and the manifestation of that intention, as early as practicable, by such improvements and badges of ownership as make it known to others. And any settlement, cultivation, or improvement, in pursuance of this intention, is sufficient to secure this right to the occupant, and to enable him to maintain ejectment against any one who disturbs him therein.

FACT THAT TRACT OF LAND CLAIMED BY SETTLER IS ONE MILE LONG, and only one fourth of a mile in width, does not invalidate his claim, or justify another in appropriating any portion of it.

OFFER OF CLAIMANT OF LAND TO BUY HIS PEACE is not, if rejected, the surrender of any legal advantage, or the admission of an adverse claim.

THE facts are stated in the opinion.

J. P. Hargrave, for the appellant.

The mere entry upon public land without inclosing it, gives no right of action on the possession alone. The com-

plainant must show affirmatively, that the land is open to settlement under the Act of Congress, and a compliance with the provisions thereof. He must be a citizen of the United States, and otherwise competent to avail himself of the pre-emption laws of the United States. The bare residence on a part of the land, and the tracing of lines, or putting up stakes or monuments designed to indicate boundaries, are not sufficient. *Sweetland v. Froe*, 6 Cal., 147; *Wright v. Whitesides*, 15 Id. 47, 48.

The possessory act of the Territory of Arizona, approved November 9, 1864, only gives protection to those who have settled upon, cultivated, or improved the public lands, for the purpose of availing themselves of the pre-emption laws of the United States. The complaint avers ownership of the land in question, and an adverse holding by the defendant.

The findings of the court, that the land is part of the public domain of the United States, and that the facts stated in plaintiff's complaint are sustained by the proof, are contradictory, vague, and insufficient to support the judgment. *Lewis v. Myers*, 3 Cal. 475.

The finding of the court, that the material allegations in the complaint are true, is insufficient. *Breeze v. Doyle*, 19 Cal., 101.

The true test of the sufficiency of the findings of the court is this: Would they be sufficient if presented by a jury in the form of a special verdict?

The facts found by the court form the basis of the judgment in like manner as the verdict of a jury does. *Russel v. Armador*, 2 Cal. 305.

James Anderson, for the respondent.

There having been no motion for a new trial in the court below, this court will not inquire whether the facts found by that court are supported by the evidence, and the only question presented to this court is whether the facts found by the court below are sufficient to sustain the judgment. *Rhine v. Bogardus*, 13 Cal. 73; *Griswold v. Sharpe*, 2 Id. 17; *Wheeler v. Hays*, 3 Id. 286.

The facts found by the court below are sufficient to warrant the judgment. Laws of Arizona Territory: Act concerning possessory rights on public land.

By the COURT:

This case arose in the court below, on the complaint of Davis against Simmons, to recover possession of the eastern half of a tract of land in Yavapai county, the whole of which is described in the said complaint as follows: "Situate on Willow creek, commencing at a stake near a hill at the south-west corner, thence north one fourth of a mile to a stake, thence east one mile to a stake, thence south one fourth of a mile to a stake, thence west one mile to the place of beginning. The said ranch being about one mile west from the house of Giles & Co., and embracing not exceeding but about one hundred and sixty acres." The plaintiff also claims two thousand dollars damages, for the detention of the described premises and costs. The date of the summons is June 5, 1865. The date of the answer, which is a mere general denial of the allegations of the complaint, is not given in the transcript before this court. On the trial of the cause the parties waived a jury, and the conclusions of law on the facts found, as stated by the court, were as follows: "That judgment must be entered for plaintiff, for the possession of about eighty acres of land, or so much of defendant's claim as may encroach on plaintiff's as originally stepped and staked by him, one quarter of a mile wide and one mile long, according to the description contained in plaintiff's complaint, with damages in the sum of six hundred dollars, for the wrongful taking and retention of said lands, to wit, about eighty acres at the eastern end of plaintiff's claim as described as aforesaid, and that execution issue according to law for the said sum of money, and that the sheriff, by a writ of restitution, put the plaintiff in possession of said lands, as aforesaid, and for all costs and disbursements in the said suit." The date of the trial and decision of the court are not given, but the transcript states that judgment was entered thereupon, with costs taxed at eighty-nine dollars and ninety cents, May 9, 1866, which was probably meant for 1865, as appears from subsequent dates. There appear to have been no exceptions made at the trial, and no further proceedings in the case, till January 22, 1866, when the defendant gave notice of his appeal "from the whole judgment entered against him," and "which is (generally) assigned as error, as being contrary to law,

and not supported by the facts found." It is not necessary to cite all the facts here; a condensed statement of them will, however, show that they fully sustain the judgment rendered in the case. From these it appears that the plaintiff, Davis, took possession of the land in controversy about the eleventh of November, 1864, measured it, put up a summer house of poles, planted in the ground, covered with brush, and placed a written notice of his claim thereupon. The plaintiff sowed a small piece of wheat November 12, 1864, and cultivated about six acres on the upper part of his claim as described. It appears that the plaintiff saw no improvement on this land as described, and did not know of the defendant's claim till about the first of the succeeding April. On the second of the succeeding January he filed with the county recorder a copy of the notice fixed to his building on the eleventh of November, 1864. It appears, from the facts as found by the court, and which seem not to be denied or controverted, that on the tenth or twelfth of December, 1864, the defendant took possession of the land in controversy, and so much more as formed with it a square, measured it by stepping, and planted stakes for corner marks, and soon after hauled some logs for a cabin, and broke about one acre of land on the tract in controversy. The defendant's building was not finished for a considerable time afterwards, in consequence of the snow. It further appears that the defendant on the fourth of May, 1865, prevented the plaintiff from going or cutting grass on the land in controversy; that he cultivated a portion of it, and gathered from it about twenty-eight thousand pounds of hay, which he sold at forty-five dollars per ton. The defendant himself testifies on the trial, that he saw the plaintiff's house when he first went and set his stakes on the land in controversy, and it appears that the defendant's father, for whom the land was originally taken up, had seen the plaintiff's notice. As early as January, 1865, it seems the Messrs. Steinbrook talked with defendant on the land in controversy as to the location or building of the plaintiff thereon. The land in controversy was part of the public domain of the United States, and at the time referred to, unsurveyed.

The essential legal requisites of a possessory right in lands here, are the intention of the occupant permanently to oc-

cupy and improve the same for his home, and the manifestation of that intention as early as practicable, by such improvements and badges of ownership as shall make it known to others. By our act, Compiled Laws, p. 536, sec. 1, any settlement, cultivation, or improvement in pursuance of this intention is sufficient to secure this right. This intention of permanent occupancy as a home, and sufficient improvement to proclaim it to the world, are all that our act concerning possessory rights in public lands, or the homestead laws of the United States, require. The plaintiff's intention to occupy the land in question as a home seems to have been continued at great peril, until he was ousted by the defendant early in 1865. His simple improvements and badges of ownership were competent notice of ownership to all the world. They were quite equal to those of defendant, with the legal advantage of a whole month's priority. The conclusion therefore is, that the plaintiff ought to have restitution of the land which he claims in the present case.

The damages of six hundred dollars are not excessive; for it appears that the defendant, in a single season, cut and sold hay of about that value from the premises in controversy. The narrow elongation of the plaintiff's land as described in his complaint can not invalidate his claim, or enable the defendant to appropriate any portion of it. Its width is equal to that of the forty-acre unit of the federal surveys; its length is not greater than the square mile from which that unit is obtained by subdivision; while, like the linear bases of the federal surveys, it extends due east and west, or as nearly so as the crude measurements of both parties without instruments could make it. For aught this court can determine, the plaintiff's claim may correspond to four continuous connected forty-acre tracts, yet to be indicated by those surveys, or even a slight variation, may be susceptible of easy territorial and legal adjustment. The plaintiff's offer to buy his peace and avoid a lawsuit for seventy-five dollars was not the surrender of any legal advantage or the admission of an adverse claim, rejected, as it seems to have been by the defendant, to whom it was made. Part of the syllabi of some cases were cited without comment as adverse to the present case, which was submitted without oral argument. On examination, however,

they do not seem to have such analogy of fact to the present case, as to make them legal precedents for its determination. Surely the Arizona settler, who suffers so much peril and privation in the location of his homestead, ought not to be ousted by precedents of doubtful application, born elsewhere of the mere safety and comforts of more favored regions. The determination of fact, and the conclusions of law, in the present case, are stated by the court below in its written decision with considerable prolixity and informality, but with sufficient certainty to show that the judgment entered thereon ought to be maintained.

The order of this court, therefore, is that the judgment of the district court of the third judicial district in the present case be affirmed, and that it be remanded there for execution.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1871.

THE UNITED STATES, APPELLANT, ·v. CERTAIN
PROPERTY, AND WILLIAM RICHARD & CO.,
RESPONDENTS.

CONGRESS HAS POWER TO REGULATE TRADE AND INTERCOURSE WITH INDIAN TRIBES inhabiting any portion of the public domain of the United States.

INDIAN COUNTRY IS PORTION OF TERRITORY INHABITED BY INDIANS whose title has not been extinguished by the United States.

LICENSE TO ENABLE CITIZEN TO TRADE WITH INDIANS is not required except in an Indian country.

SEC. 19 OF ACT OF CONGRESS OF 1802, ALLOWING TRADE and intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, is in force in Arizona, because its provisions are applicable to the condition of affairs existing therein.

PROPERTY OF TRADER SEIZED OUTSIDE OF INDIAN RESERVATION is not forfeitable by reason of the fact that he has no license to trade, from an Indian superintendent or agent.

INDIAN RESERVATION IS CERTAIN LIMITED PORTION of our national domain, assigned by the federal government to a tribe or tribes of Indians, to be held by them according to the terms of the assignment.

CERTIFICATE OF PROBABLE CAUSE SHOULD NOT BE GIVEN BY COURT, where the facts in the case show no reasonable cause for making the seizure.

THE facts are stated in the opinion.

C. W. C. Rowell, for the appellant.

Certificate of "probable cause" should have been granted by the court below. It is claimed by the appellant that if error existed at all in making the seizure, it arose from an improper construction of the intercourse act of 1834, and was error of law, therefore the certificate should have been granted. See Conkling's Treatise, 501, 502, 503; *United States v. Riddle*, 5 Cranch, 311.

It is claimed by appellant that all the territory within the United States, except that specially exempted, is, by the act of 1834, Indian country for the purposes of that act alone. See Intercourse Act of 1802, 2 Stats. at Large, 139, which specifies the boundaries of the Indian country as defined by that act, and also the act of 1834; 4 U. S. Stats. at Large, 729, which defines the lines as they now exist; also *American Fur Co. v. United States*, 2 Pet. 358; *Cherokee Nation v. State of Georgia*, 5 Pet. 1.

These cases show the status of the Indians in their relations with the government, as well as the interpretation of the act of 1802.

The case of *United States v. Holliday*, 3 Wall. 407, the most important case bearing upon this question since the act of 1834 was passed, settles the question of trade and intercourse with the Indians under the last-named act.

See also, Constitution of the U. S., sub. 8 of art. 3, as to rights of congress to regulate that trade.

J. E. McCaffry, for the respondent.

By Court, *TITUS, C. J.*:

This proceeding was instituted July 29, 1871, by petition and information, in the district court of the first judicial district of Arizona, for the condemnation of certain merchandise, therein described, alleged to have been forfeited and seized as such, June 20, 1871, near the reservation of the Pima and Maricopa Indians, by Capt. Frederick E. Grossman, special Indian agent, on a charge of illegal traffic with the said Indians.

On the twenty-first of October last, William Birchard & Co. were, on their petition and claim as sole owners, permitted to defend the said property from the decree of con-

demnation thus prayed for; and they having filed their bond for seven thousand dollars, the value of the property, with sufficient sureties, the case proceeded.

The property in contest, including a barrel of whisky, was alleged, in the information, to have been seized on the Indian reservation above mentioned. This allegation, however, was afterwards found to be erroneous, and was abandoned, as appears by the stipulations filed and of record in the present case; which stipulations admit the conclusions of fact on which the judgment of the court below was prayed—it being therein stated by the attorney for the United States as well as by the attorney for the claimants, “that the place of business of William Bichard & Co., wherein the goods, against which this action was brought, were seized, was and is off the limits of the described Indian reservation, very close to the southern boundary of said reserve—in fact within a few feet of the line; and that the lands outside the said Pima and Maricopa reservation are open to survey and pre-emption, including the place of seizure.”

The deposition of the said Capt. Grossman referred to in the stipulations filed, was agreed in open court, on the hearing below, to be dispensed with as containing nothing but what was and is of judicial notoriety, “except that the articles alleged in the information and the said deposition mentioned as on storage shall be for the purposes of this trial considered as *in transitu* only.”

It may be added as of public notoriety here, that the lands thus described in the records as “outside of the Pima and Maricopa reservation” and “including the place of seizure” have been partially surveyed, and are now occupied, cultivated, and improved, under the authority of the United States, by American and Mexican residents, either citizens, or seeking and awaiting citizenship under our laws; that the lands recently proposed to be annexed to the said reservation, alone contain, as appears from authoritative reports made by congress, twenty-five of these American and Mexican residents, and that the whole valley of the Gila river, including the place of seizure round it and outside of the reservation, is better settled with permanent residents, excluding Indians, than any other rural portion of Arizona.

The store of the claimants, where the merchandise in controversy was seized, is near the principal highway from Tucson to Fort Yuma; and it is also matter of public notoriety here that claimants carry on an active trade, not only with the residents on Gila river, but also with travelers by the said road.

On the part of the United States, it was alleged upon the hearing of this case, in the court below: First, that all the territory of the United States west of the Mississippi river, with little, if any, exception, is Indian country; second, that no one can lawfully trade therein with an Indian or Indians, without a license from some Indian superintendent or agent; and third, that the claimants William Bichard & Co. having traded with the Pima and Maricopa Indians without such license, the merchandise seized as above stated and described is forfeitable and ought to be condemned.

The district court after argument upon record of the case refused the decree of condemnation prayed for. An appeal was taken from its judgment to this court on behalf of the United States; and the errors alleged in the judgment of the court below, on the argument of the appeal, though not formally presented in this court, were the denial of the three propositions above cited, and the omission of that court to certify that there was probable cause for the seizure of the property in controversy.

It has been conceded by all in every stage of this case that congress has power to dispose of and make all useful rules and regulations respecting the territory or other property, and regulate commerce with the Indian tribes of the United States. Congress has to a considerable extent exercised both these powers.

It is not necessary to inquire whether congress has exhausted the whole of these two classes of powers, in its legislation thereupon. It is quite sufficient for the present case to determine whether or not it has passed any law which authorizes us to condemn the property in controversy. No other class of ordinary federal legislation is so full of pains, penalties, and forfeitures as that which regulates trade and intercourse with the Indians, *a posteriori*, therefore this court can not be too cautious in declaring where and to whom it applies.

Throughout this whole case the United States has relied on the congressional act of June 30, 1834, 4 U. S. Stat. at L. 729, especially its first section, as entitling it to a decree for the forfeiture of the property in controversy.

That section is as follows:

“That all that part of the United States, west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas; and also other parts of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished, for the purposes of this act (shall) be taken and deemed to be the Indian country.”

This provision must be regarded as a description, by the highest legislative authority, of what an Indian country is. Its special purpose is declared, as in and by no other, to be “for the purpose of this act” itself, so it says, however, whenever and wherever it applies and extends. This declaration shows the place of operation, of every pain, of every penalty, of every forfeiture, of every license, and of every prohibition which the law authorizes concerning trade and intercourse with Indians.

And in this statute, as well as in those since enacted, the limitation Indian country, as here declared, is the place, and no other, to which all their consequences, whether lenient or severe, are applied.

A brief analysis of this provision will show us what it comprehends. Its purpose was, obviously, to declare what an Indian country should be thereafter. The limitation employed is, “to which the Indian title has not been extinguished.” This was and is the badge of law to show an Indian country to all mankind. The territory, then and since, that could abide this test, was the Indian country, and no other.

Section 2 of the same act proceeds to apply this test. It is as follows: “No person shall be permitted to trade without license with any of the Indians.” Where? In the Indian country.

Section 3 allows an Indian superintendent or agent to refuse license to a person of bad character because it would not be proper for him to reside—where? In the Indian country. Section 4 forfeits the goods of the man who

without license resides as a trader, or introduces goods, or trades—where? In the Indian country. Such is the limitation throughout this whole act. All its penal consequences are referred to the Indian country.

The same limitation is preserved in later acts. The act of June 14, 1858, 11 Stat. at L. 363, authorizes the marshal to employ a *posse comitatus*, not exceeding three persons, in any of the states, respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country. The act of March 15, 1864, sec. 1, 13 Stat. at L. 29, makes it penal for any person to sell, exchange, give, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or to introduce the same into any Indian country.

Thus by an analysis of our laws regulating trade and intercourse with the Indians the conclusion is reached that an Indian country as declared by the first section of the act of 1834 is one "to which the Indian title has not been extinguished;" that there it is that a license is required to enable the citizen to trade with the Indians, and that in the Indian country, as thus described, apply the pains, penalties, prohibitions, and forfeitures declared by our acts regulating trade and intercourse with the Indians.

The venerable maxim of legal construction, *Expressio unius est exclusio alterius*, which thus ordains, that where in a statute one or a few of a class of particulars are enumerated, it must be taken that all the rest of this class not enumerated are intended to be excluded from its operation, impels to the conclusion that in no other than the Indian country as described by the act of 1834 is a license required to enable the citizen to trade with the Indians, and that in no other do the pains, penalties, prohibitions, and forfeitures denounced by the laws regulating trade and intercourse with the Indians, apply at all.

On this conclusion alone the condemnation prayed for in this case might be denied. The magnitude of the question involved, however, it is submitted, requires a more exhaustive examination of the law; and by a different mode of investigation, and of a different class of legal provisions, the judicial mind is carried to the same conclusions.

The act of 1834 already examined was the consummation

of more than fifty years of tentative Indian legislation, the act of 1802 of thirteen years of similar legislation, under the constitution.

The act of March 30, 1802, 2 Stat. at L. 145, provides: "Sec. 19. Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States."

The same provision is found in the act of July 22, 1790, 1 Stat. at L. 137, in the act of March 1, 1793, sec. 13, 1 Stat. at L. 329, and in the act of May 19, 1796, sec. 19, 1 Stat. at L. 469, which was the last act on the subject preceding that of 1802, from which the citation under immediate consideration is taken. In reference to this provision the act of 1834 thus provides in its repealing clause: "Sec. 29. That such repeal shall not affect the intercourse act of 1802 so far as the same relates to or concerns Indian tribes east of the Mississippi river." Why, it may be asked, was this reservation in the act of 1834 made in favor of the states and citizens east of the Mississippi river? It was because they comprised great numbers of citizens settled around Indians upon lands of their own or those of the United States, which the federal government did not mean should be embarrassed, by the monopolies of license in their trade with the Indians, or others. The act of 1834 regulating trade and intercourse with the Indians is to some extent the result of the then recent cases of the *American Fur Co. v. The United States*, 2 Pet. 358; *Cherokee Nation v. The State of Georgia*, 5 Id. 1, and *Worcester v. The State of Georgia*, 6 Id. 547—the last of which was decided in the supreme court of the United States only two years before the passage of the act of 1834.

At the date of the act of 1834, there were but two organized territories east of the Mississippi river, Michigan and Florida. In these, however, and as well in the vast domain west of that river, large and ever-increasing communities of citizens had settled and were settling around Indian settlements on lands of their own or those of the United States; and it was to prevent these and other similar ones sure to arise from being cramped and embarrassed in their trade and intercourse, that the Indian country was by the act of

1834 circumscribed to territory "in which the Indian title had not been extinguished."

The protection and improvement of the Indians has been a cherished policy of the United States. Not less so has been the settlement of the public domain by citizens, its organization and development as territories, and their final admission into the union as states co-equal with those already there. The laws regulating trade and intercourse with the Indians are the offspring of both branches of this policy, and any construction of these laws which excludes either branch of this policy from its consideration must be vicious.

The act of 1834, sec. 29, we have seen, limited to the states east of the Mississippi river the act of 1802, sec. 19, which allowed free "trade and intercourse with Indians living on lands surrounded by settlements of the citizens of the United States." The act of 1802, though thus limited, has never been repealed. After the passage of the act of 1834 the first territory established was Wisconsin, organized April 20, 1836, and the last was Wyoming, organized July 26, 1868. In the organic act of each of the fifteen territories established since the act of 1834 will be found a provision substantially, if not literally, as follows:

"That the constitution, and the laws of the United States, which are not locally inapplicable, shall have the same force and effect in said territory as elsewhere in the United States." This is the provision on the subject in the organic act of New Mexico, which, with its legislation at the date of our organic act, was, by the second section of our organic act, made applicable to the territory of Arizona.

The only test provided, relative to the laws of the United States, is their applicability to the territory of Arizona. The laws of the United States, which are applicable to Arizona, have the same force and effect here as elsewhere. Is the nineteenth section of the act of 1802, allowing free trade to citizens of the United States settled around Indians, and limited to the east of the Mississippi by the twenty-ninth section of the act of 1834, applicable to Arizona? If so, then it must govern the present case.

Still further: The act of February 27, 1851, sec. 7, 9 Stat. at L. 587, is as follows: "All the laws now in force regu-

lating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be and the same are hereby extended over the Indian tribes in the Territories of New Mexico and Utah." By the act of August 4, 1854, sec. 1, 10 Stats. at L. 575, the territory now comprised in Arizona was annexed to New Mexico. The law regulating trade and intercourse with the Indians was, therefore, the law of Arizona, so far as applicable, for more than eight years prior to its organic act of 1863, 12 Stats. at L. 664, and would have so remained after its organization as a territory without a special provision on the subject. The question then occurs, is section 19 of the Indian intercourse act of 1802 in force in this territory? Mere inspection, it is submitted, shows it is so applicable, by all the exigencies that made it universal in 1802, and applied it east of the Mississippi river after 1834. In this territory there are settlements of citizens on lands their own, or so to become, unaffected by any Indian title, and around Indian settlements. The store of William Bichard & Co. where the controverted property was seized is in one of these citizen settlements. It can not be for the benefit of either the Indians or citizens, under such circumstances, to compel the one class to buy of some monopolist, relieved of all competition by his license, or to compel the other to purchase licenses before they can sell to an Indian or Indians, who choose to purchase where they can do so the cheapest or the best.

The conclusion, therefore, is that William Bichard & Co. required no license to enable them to trade with the Indians outside of any Indian reservation, or land unaffected by Indian title, and that the property controverted in this case, seized, as it was, on neither, is not forfeitable by reason of their not having such license. To prevent misconception, it may not be improper to state some limitations on some of the terms used above, and some of the conclusions reached.

An Indian title is one of mere occupancy, possession, or use, subject to the right of pre-emption in the United States. An Indian country is a portion of territory subject to an Indian title, inhabited by Indians. A mere solitude, or a country without Indians, could hardly be considered an In-

dian country, even if their title, which is merely possessory, could survive the absolute absence of its beneficiaries. An Indian reservation may be defined to be a certain limited portion of our national domain, assigned by the federal government to a tribe or tribes of Indians, or some part or parts of the same, to be held by them according to the terms of the assignment.

An Indian reservation and an Indian country are so far legal equivalents that the laws of the United States regulating trade and intercourse with the Indians apply alike to both. Licenses to trade in either are grantable by an Indian superintendent, agent, or subagent.

The act of March 15, 1864, sec. 1, 13 Stat. at L. 29, makes it an offense equally penal, to sell, exchange, give, barter, or dispose of any spirituous liquors, or wines, to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or to introduce the same into the Indian country. This conclusion is supported by the following cases: *The United States v. The American Fur Co.*, 2 Pet. 358; *The United States v. Holliday*, and *The United States v. Haas*, 3 Wall. 407.

To enable a person to buy or sell the live-stock of an Indian beyond the Indian country or an Indian reservation, a license is necessary. No license can anywhere legalize selling liquor to Indians. *United States v. Holliday* and *United States v. Haas*, 3 Wall. 407.

License can not authorize the purchase, by one not an Indian, of the arms, or clothing, or implements of labor, or domestic utensils of an Indian, or Indians. It is not pretended or alleged that the claimants in the present case, or any of them, have sold or offered to sell liquor to the Indians, or that they have infringed any of the other provisions of our Indian intercourse laws, or that they have indulged in any unconscionable practices with the Indians, or with others. On the contrary, it is a matter of public notoriety here that they have done much to advance agriculture among the Indians and in the neighboring settlements by the importation and distribution of seeds, as well as by other similar services.

The certificate of probable cause, in this case, was withheld by the judge of the court below because nothing ap-

peared in the case to show any probable cause for the seizure of the property in controversy.

By the act of congress concerning frauds on the revenue of March 2, 1799, 1 Stat. at L. 696, it is provided, sec. 89, that in prosecutions for seizures under that act, "if it shall appear to the court, before whom such prosecution shall be tried, that there was reasonable cause for such seizure, the said court shall cause a proper certificate, or entry, to be made thereof," etc. If no probable cause appears in any case, such as this, for the seizure of the property in controversy, the judge is not justifiable in making such certificate, or entry. No such cause appearing in the present case, the certificate was properly omitted.

Nothing appearing in this case to show that the property in controversy was at any time within an Indian reservation or in an Indian country, or that there was any probable cause for the seizure of the said property, or that the claimants have, in any particular, infringed the laws of the United States regulating trade and intercourse with the Indians, or any of the said laws, the decree of the district court of the first judicial district of Arizona, made in this case, is hereby affirmed, and the certificate of probable cause is refused.

TWEED, J., concurred.

REAVIS, J., delivered the following dissenting opinion:

I regret that I am unable to concur with the majority of the court in the opinion just read, and I proceed to give my reasons for such dissent. The grave importance of the subject-matter of the cause at bar, in my judgment, demands the most careful examination possible, to the end that a just conclusion may be arrived at in the premises touching the legal rights of the parties interested, and to be affected by the determination of the questions at issue. In the month of June, 1871, the agent appointed by the government for the confederate tribes of Pima and Maricopa Indians seized the goods in question, which are claimed by William Bichard & Co., for an alleged violation of the intercourse laws of the United States regulating trade and commerce with the Indian tribes. The information filed in the court below

recites, among other things, that the illicit trade with the Indians was and had been carried on by the claimants on the reservation set apart for the tribes mentioned; but the stipulations of counsel upon which the case comes into this court disclose the fact that claimants' place of business was off, but very near to, say a few feet from, the southern boundary of the reservation.

There is nothing in the record, however, to show that the claimants knew before the date of the seizure that their storehouse stood on the outside of the reservation boundary, nor does it appear that they became aware of its exact locality until a survey of the original lines of the reservation was had at their own instance, after the seizure had been made.

But this is not a material question for the purposes of this inquiry, and I pass it by for the present. The points decided by the majority of the court, as I have been able to gather them from the opinion of the chief justice who delivered the judgment of the court, are substantially:

1. That the seizure of the goods of claimants was unlawful and unauthorized, for the reason that the place where they were stored and kept was outside of the Indian reservation.

2. That the act of 1834, in its operation, is limited to that portion of the public domain of the United States where the Indian title has not been extinguished.

3. That an Indian reservation and an Indian country "are so far legal equivalents that the laws of the United States regulating trade and intercourse with the Indians apply alike to both." In other words, for the purposes of the intercourse laws mentioned, it is Indian country on the inside of the reservation lines, and not such on the outside; and that, whereas it would be a violation of the act of 1834 to trade with the Pima and Maricopa Indians on the inside of the lines of their reservation without a license, it would not be if the trade with the same Indians was had on the outside.

4. That the intercourse act of 1802 is in full force in this territory, and especially the nineteenth section thereof, allowing free trade and intercourse between Indians on a reservation and citizens settled on lands around them.

5. That William Bichard & Co. require no license to trade with the outside of any Indian reservation on land unaffected by Indian title, and that the property seized is not forfeitable on account of their omission to obtain one to trade with the Indians.

6. That the certificate of probable cause was properly withheld, because nothing appeared in the case to show any probable cause for the seizure of the property.

The foregoing propositions furnished the premises from which the conclusions of the court appear to be drawn, but I shall not consider them exactly in the order I have mentioned them.

It is nowhere denied that congress has the power under the constitution to regulate trade and intercourse with the Indian tribes inhabiting any portion of the public domain of the United States; nor is it denied that this power has been exercised to the extent necessary to meet the exigencies of the relative situation and condition of the government and the Indians every year since the adoption of the constitution. The faith of the government has always been pledged for the protection of those tribes with whom it has entered into treaty stipulations, or one to whom its intercourse laws have been extended, regulating trade and commerce therewith.

In the case of the *Cherokee Nation v. State of Georgia*, Chief Justice Marshall, who delivered the opinion of the court, held that an Indian tribe or nation within the United States is not a foreign state "within the meaning of the second section of the third article of the constitution." In the same opinion the learned jurist held that the Indians were in a state of pupillage. "Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection, appeal to it for relief to their wants, and address the president as their great father." It therefore follows that the relation of these tribes to the general government is marked by "peculiar distinctions," in the regulation of trade and intercourse, "which exist nowhere else." The first section of the intercourse act of 1834 defines what was known as the Indian country at that day, west of the Mississippi river. That designation, with the exception of the states of Missouri, Louisiana, and the terri-

tory of Arkansas, comprehended the whole of the possessions of the United States west of the Mississippi.

The territory over which that law was to have its operation had been acquired by the United States from the republic of France by treaty of cession at Paris, April 30, 1803, the sixth article of which treaty provides: "That the United States promises to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations other suitable articles shall have been agreed upon." The act of 1834, and all subsequent treaties made with the Indian tribes inhabiting such territory, was enacted and made in pursuance of the treaty of cession of 1803, which practically recognized and secured to the Indians some sort of title to the soil, which the United States has from time to time extinguished by purchase under treaties for that purpose. The twenty-fourth section of the act of 1834 repealed the act of 1802 so far as its operation was concerned with reference to the Indians living west of the Mississippi river, but continued it in force over those east of it.

I can not agree with the majority of my brethren of the bench, that any subsequent legislation on the part of congress has resuscitated that act so as to make it operative everywhere within the jurisdictional limits of the United States.

The act of congress of 1851, extending all the intercourse acts, not locally inapplicable, over the Indians inhabiting the territories of New Mexico and Utah, does not by necessary implication or otherwise revive the act of 1802, for the purposes of such extension. There is nothing in the act of 1851, or any other act on the same subject, in my judgment, to indicate such an intention on the part of the national legislature. I conclude, therefore, that the act of 1834, and the acts amendatory thereof, are the only laws in force in this territory, on the subject of trade and intercourse with the Indian tribes residing herein.

That portion of the territory in which is located the Pima and Maricopa reservation was acquired from the republic of Mexico by treaty in 1854, known as the Gadsden treaty, in which no provision is made respecting any Indian tribes who might be living here at the time. So the status of all

such Indians must depend upon existing laws, in so far as the question of trade and intercourse with them is concerned. These laws have already been referred to, and the question recurs, how far are they locally applicable to the Arizona tribes, and what operation did the congress intend they should have in the matter of regulating trade and commerce with them.

There is no pretense set up that these Indians occupy an analogous position, with reference to the soil of the country here, to those who resided in the Indian country designated in the act of 1834, and the question of Indian title can have no weight in the determination of the question at issue in this case. The act of 1834 is sufficiently described in its title, viz., "*An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier,*" and in the first section it expressly declares, after giving a description of certain territory, that such territory so described, with the exceptions therein mentioned, "*for the purposes of this act, be taken and deemed the Indian country.*" What were the purposes of that act? The question is fully answered in the title just given. The territory mentioned therein was Indian country for no other purpose than for the regulation of trade with the Indians, and its operation everywhere must be uniform to that extent. I agree with the learned chief justice who wrote the opinion of the court in this case, that we can not very well have an Indian country without the bodily presence of Indians, and where we have such Indians, whether they have submitted themselves to the control of the government, or occupy a hostile attitude thereto, the matter of trade and intercourse with them in either capacity must be regulated by the existing laws provided for the purpose. All the decisions on the subject pronounced in the supreme court of the United States agree that the various intercourse acts passed from time to time by congress have been intended to protect the Indians against fraud and deception, and to regulate trade and commerce with the various tribes upon the broadest principles of equity and justice. To that end those localities inhabited by Indian tribes have been carved into convenient districts or superintendencies, and a suitable person selected by the president of the United States for each of such dis-

tricts, who, by and with the advice and consent of the senate, is appointed to superintend the affairs of the Indians in the particular districts; and for each individual tribe an agent is selected in the same manner, and these officers must report to, and are directly under the control of, one of the political departments of the government, known as the "Department of the Interior," which is charged with the execution of all the laws having reference to Indian affairs. These officers are required to give ample bonds for the faithful performance of their duties as prescribed by law, among which is the selection of proper persons to act as traders with the Indians, who are licensed for that purpose, and give bonds conditioned for the faithful performance of the duties imposed by law, and to obey all such rules and regulations in the premises as shall from time to time be prescribed by the head of the department referred to. There has been a superintendent of Indian affairs provided for Arizona, and there are agents for the confederate tribes of Pima and Maricopa Indians, with whom the illicit trade complained of in this cause was carried on; and these officers were in the active discharge of the duties of these several offices at the time the seizure of the goods in question was made. There were also at the same time licensed traders duly appointed and qualified to trade with these Indians. These traders are called monopolists by the learned judge who delivered the opinion of the court in this case, and he assumes that the act of 1834 was passed in consequence of the decisions in the cases of the *American Fur Co. v. United States*, *Cherokee Nation v. State of Georgia*, and *Worcester v. State of Georgia*, in none of which have I been able to find doctrines in support of the assumption. The language of the act itself makes it very clear, that while congress believes the provisions of the act of 1802 were ample for the purposes of trade and intercourse with the Indians east of the Mississippi, they were not deemed sufficient for the purpose in the case of the Indians on the west side of that river. All the states of the union at that time, except two, lay between the Mississippi river and the Atlantic ocean, and the act of 1834 was intended to operate upon those Indians inhabiting the territory mentioned in the first section thereof.

The majority of the court hold that inasmuch as the trade complained of, and the seizure of the goods in consequence thereof, all took place outside of the reservation, that *per se* the trade was not unlawful, but the seizure of the goods was. Is it true that the government and the laws afford no protection to the Indians outside of the lines of the reservation? Does the authority to regulate trade, traffic, or commerce extend no farther than the boundaries of such reservation?

In the case of the *United States v. Holliday*, 3 Wall. 407, the supreme court said that if commerce or traffic or intercourse is carried on with an Indian tribe, or with a number of such tribes, it is subject to be regulated by congress, although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

The same doctrine was held in the case of the *United States v. Haas*, 3 Wall. 407.

I have no doubt of the power of the agents of the government to prevent any person from trading with Indians under their charge, unless specially authorized by law to do so, and this, whether on or off the Indian reservation. Whether the goods of the offender would be liable to seizure will depend upon the circumstances of the particular case, but that such agents have the power to make such seizure for a violation of the intercourse act, I have equally no doubt. In this case the certificate of "probable cause" should have been issued; its issuance is not a matter of discretion of the court, to be exercised at pleasure, and to withhold it in this case is error. It is for the protection of an officer of the government, when acting officially in pursuance of what he conceives to be the law, or under orders from his superior officer. In either case he is entitled to the certificate.

For these reasons I can not concur in the opinion and judgment of the court.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1872.

**TERRITORY OF ARIZONA EX REL. C. W. C. ROWELL,
DISTRICT ATTORNEY, RELATOR, v. WILLIAM H. FOR-
REST, ADMINISTRATOR, RESPONDENT.**

ANY JUSTICE OF SUPREME COURT MAY GRANT WRIT OF CERTIORARI. The authority given to each of the justices to issue this writ is precisely the same as that given to the court.

RECEIVER APPOINTED TO TAKE CHARGE OF ESCHEATED ESTATE of a deceased person is entitled to the custody of the realty only, and of the rents and profits thereof. The administrator of such an estate is the proper custodian of the personalty belonging thereto, and the district court has no authority to compel him to turn over the personal estate to such receiver.

JURISDICTION OF DISTRICT COURTS IN MATTERS COGNIZABLE IN PROBATE COURTS is wholly appellate.

CERTIORARI to the district court of the second judicial district. The opinion states the case.

C. W. C. Rowell, for the relator.

J. P. Hargrave, for the respondent.

A. T. REPS. I—4

By Court, TWEED, J.:

This is a *certiorari* granted by the supreme court and directed to the district court, second judicial district in and for the county of Yuma.

The record or transcript in the case shows that the relator, William H. Forrest, was appointed administrator of the estate of Robert Cavennaugh, deceased, by the probate court for the county of Yuma, on the twenty-sixth day of December, 1859. That the relator qualified and entered upon his duties as such administrator and continued to act as such administrator up to the time his petition herein was filed. That his letters had not been revoked and no proceedings had been instituted in said probate court for their revocation. That the property of said estate consisted of certain real estate situated in Arizona city, Yuma county, and of money and other personal property of the value in all of some twelve thousand dollars.

That in November, 1871, and during the session of the district court in and for said county of Yuma, an information was filed in said court by the acting district attorney of said county of Yuma, alleging the escheat of said estate to the territory of Arizona, and praying among other things for a decree vesting said estate in said territory.

It is also alleged in the information, in very loose and general terms, that the estate was being badly managed by the administrator, and the court asked to appoint a receiver therein. Upon this information such proceedings were had that on the thirteenth day of November an order was entered in said court appointing Thomas Hughes receiver, to take charge of said estate, and a further order therein made, directing said administrator, "the relator herein," upon application of said Thomas Hughes, receiver, at once to turn over to said receiver all property and moneys in his hands or under his control belonging to said estate.

The foregoing contains all that is material in the transcript for consideration in passing upon the question to be decided. The relator, in his petition and in his brief filed, insists that the said court acted without authority of law and exceeded its jurisdiction in making the order, in so far as such order required the relator to turn over and deliver the personal

property and effects in his hands as the administrator of said estate to the receiver.

The case was submitted to us without argument, but upon briefs filed in the case of the *Territory v. Neahr*, also before us by *certiorari* at this time.

In the argument in that case and by the brief filed by respondent, it was insisted that the writ was improperly issued, the order for the issuance of the writ having been made in that case as in this by his honor the chief justice. We however are satisfied that in this regard the writ was properly issued. Section 5 of the statute conferring jurisdiction, Compiled Laws, page 375, reads as follows: "This court [supreme court] and each of the justices thereof shall have power to issue all writs necessary or proper to the complete exercise of the powers conferred by law and by this and other statutes." It seems clear to us that under this section the authority given to each of the justices in the issuance of this writ is precisely the same as that given to "this court."

The fact that the supreme court judges are also the district judges may be a good reason for changing the law so that a concurrence of two should be required to grant the writ; but we think the language of the section quoted unequivocal, and in conferring upon "this court" and each of the justices thereof the power to issue writs, it must be deemed that the legislature intended to bestow upon each of the justices all the powers conferred upon this court in this regard.

This brings us to the consideration of the question whether or not the district court exceeded its power and jurisdiction in the matter complained of by the relator. We regret that we are compelled to pass upon and dispose of the question at issue hurriedly. No term of this court can be held until next January, and it is important to litigants that the causes before us which have been submitted shall be passed upon and decided at this term. Under such circumstances we can not set out as fully as we desire to do the reasons for, and the grounds upon, which our decisions are made.

Conceding the proceeding had in the district court to decree the escheat of the estate of Cavenaugh to have been regular, and the appointment of a receiver in such proceed-

ings to have been necessary and proper, was there any authority in said court to compel the administrator to turn over the personalty of said estate to the receiver? We think there was not, and that the court in making such order acted without authority of law and in excess of its legitimate jurisdiction. The statute relating to escheats, Compiled Laws, pages 561, 562, 563, nowhere contemplates, even when a receiver is appointed, that he shall be the custodian of the estate beyond the realty and the rents and profits thereof; but expressly provides that the administrator shall proceed to settle the estate as in other cases; and after all just debts against the estate are paid, together with the expenses of administration, shall pay over the residue of moneys belonging to the estate, if any there be, not to the receiver, but to the territorial treasurer, who shall place the same in the general fund of the territory. It is proper to add, that the district court of the territory have only appellate jurisdiction of matters properly cognizable in the probate courts, and that the exercise of other than appellate jurisdiction in such matters is unauthorized by law.

Our decision is, and it is so ordered, that the district court of the second judicial district in and for the county of Yuma so modify its order herein as to make the receiver so appointed the custodian only of the real property, with the rents and profits thereof, and that said order, so far as it requires the administrator, the relator herein, to turn over the moneys or other personal property of said estate to said receiver, be vacated.

**TERRITORY OF ARIZONA, RESPONDENT, v. A. A. MIX,
APPELLANT.**

ADMINISTRATOR IS BY LAW PRESUMED TO HAVE DONE HIS DUTY, until the contrary is shown.

PRESUMPTION IN FAVOR OF REGULARITY OF ORDER OF COURT does not arise in a case where the order is made in a matter over which the court has no jurisdiction.

DISTRICT COURTS HAVE NO POWER TO APPOINT ADMINISTRATORS of estates of deceased persons. In probate matters their jurisdiction is purely appellate. The power to appoint administrators belongs exclusively to the probate courts.

APPEAL from the second judicial district. The facts are stated in the opinion.

Clarence Gray, for the appellant.

Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order and decency in its presence, and may apprehend and punish an offender, when the offense is committed in its presence, without further examination or proof; but when the offense is committed out of court, the party is entitled to a hearing in his defense. *People ex rel. Field v. Turner*, 1 Cal. 152.

An order of court adjudging a party guilty of contempt should always show upon its face the facts upon which the exercise of the power is based and the adjudication is made. *People ex rel. Field v. Turner*, 1 Cal. 152.

When the district court dismissed the appeal in the case of *Kelly v. Mix*, it lost jurisdiction of the parties as regarded their connection with the administration of the estate of M. D. Dobbins, deceased. The matter of their removal from office, or of either of them, belonged exclusively to the probate court. *Deck's Estate v. Gherke*, 6 Cal. 666; *Lucich v. Medin*, 3 Nev. 93.

The word "chambers," as defined by the law, is a room or apartment belonging to the court or the judges, for the dispatch of summary business. *Bouv. Dict.*, vol. 1, p. 134.

When the contempt is not committed in the immediate view or presence of the court or judge at chambers, an affidavit of the facts constituting the contempt shall be presented to the court or judge. *Howell's Code*, sec. 483.

The defendant has the right to answer the charges of contempt if any were made against him. *Howell's Code*, sec. 490.

The judgments of courts do not extend to depriving the accused of any office that he may hold or be entitled to, as a punishment for contempt. *Howell's Code*, secs. 490, 495.

An appeal lies from a judgment or order putting a party in contempt. *Ware v. Robinson*, 9 Cal. 107.

William P. Miller, for the respondent.

By Court, TITUS, C. J.:

This is an appeal from the final judgment of the district court of the second judicial district of Arizona, upon a special proceeding therein pending.

The transcript of the record filed in this court discloses the following state of facts in the case: On the eighth of October, 1871, A. A. Mix, the appellant, was by the probate court of the county of Yuma appointed special administrator of the estate of M. D. Dobbins, then late of the said county, deceased. Subsequently R. B. Kelly applied to the said probate court for appointment as administrator of the same estate. This application was rejected, and the said R. B. Kelly appealed to the district court aforesaid from the judgment of rejection by the probate court, the said A. A. Mix being made appellee. That appeal, as the records allege, was dismissed, and an order entered by the said district court, appointing both the said R. B. Kelly and the said defendant Mix administrators, to act conjointly in the administration and settlement of the said estate. Such is the statement of the record as shown by the transcript. Subsequently, on the twenty-fifth of December, 1871, the said A. A. Mix was, by the order of the said district court, dismissed from the administration of the said estate for disobeying, as the record alleges, a lawful order of the said court, addressed to him as such administrator, as appears from the record itself.

Upon this state of facts the appeal is made to this court, and the order of the district court dismissing the appellant A. A. Mix from the administration of the estate aforesaid is the error alleged in the procedure of the court below.

This case, like all special proceedings, is an unusual one, and the facts disclosed by the transcript are not so full as to exclude all conjecture; enough, however, appears to show this court that the whole procedure below, from the rejection of Kelly's application for administration by the probate court to the dismissal, as it purports, of Mix by the district court, is one entire integral procedure, and must be so regarded by this court in its disposition of the case.

There is nothing in the record to show that Mix was not doing his whole duty as administrator, at any time from the beginning to the end of this proceeding. The presumption

of law regarding administrators, as well as of other officials, is, that they do their duty until the contrary is shown. The action of the district court strongly aids this presumption, for instead of dismissing Mix on Kelly's appeal, it dismissed the appeal itself, and appointed Mix.

Had the district court stopped there, no possible exception could have been made to its action. The record, however, shows that it went much farther than this, for it appointed both Mix and Kelly co-administrators, and at last dismissed Mix from the administration for disobeying one of its orders.

The character of the order disobeyed is not, however, stated in the transcript, and the presumption of law would hardly be in its favor, against an administrator whose appointment and direction must come from another court, having a primary jurisdiction exclusively its own, which the district court can neither share nor touch nor question.

The opinion of this court is, that everything done by the district court in this case, after the dismissal of Kelly's appeal, was without authority of law, and therefore null and void; that from all that appears from the record before us, A. A. Mix is still the sole administrator of the estate of M. D. Dobbins, deceased, and primarily amenable and accountable to the probate court of Yuma county, and no other.

The order of this court, therefore, is that the district court of the second judicial district of Arizona vacate and rescind of record its several orders appointing R. B. Kelly and dismissing A. A. Mix as the administrators of the estate of M. D. Dobbins, deceased; that A. A. Mix, or whoever is or may be appointed administrator of the said estate by the probate court of Yuma county, be allowed to administer such estate as the law directs, and that the clerk of this court certify this order to the said district court.

TWEED, J., concurred.

REAVIS, J., delivered the following dissenting opinion:

This cause is here on a pretended appeal from the district court for Yuma county. I can not concur in the judgment of the court. There are two reasons why this case should be dismissed: first, it is not a case in which the law al-

lows an appeal; second, if it were such a case, there is no appeal taken in the manner provided by law. Section 350 of the civil code of the territory provides, that "to render an appeal effectual for any purpose in any case, a written undertaking should be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damage and costs which may be awarded against him on an appeal, not exceeding three hundred dollars, or that sum should be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. Such undertaking should be filed or such deposit made with the clerk within twenty days after the notice of appeal is filed, or such further time as the court upon application may allow."

No such undertaking has been given or deposit made in this cause, as the law expressly requires, nor is there anything in the record to show that the time for filing such undertaking or making such deposit has been extended by the court.

For these reasons it is very clear that this case is not properly before this court, and should be dismissed.

**TERRITORY OF ARIZONA, RESPONDENT, v. ANTHONY
DORMAN, APPELLANT.**

CHARGE OF COURT TO JURY IN CRIMINAL CASE MUST BE IN WRITING; and unless a written charge be expressly waived by the defendant, a failure to give it is sufficient ground for the reversal of a judgment rendered against him.

WHERE JUDGMENT OF LOWER COURT IN CRIMINAL CASE IS REVERSED on appeal, the defendant may be tried anew in the court below. In such a case the law does not regard the accused as having been placed in jeopardy by the former trial.

APPEAL from the district court of Pima county. The opinion states the case.

Coles Bashford, for the appellant.

J. E. McCaffry, for the respondent.

By COURT:

At the October term of the district court sitting in and for the county of Pima, the defendant and appellant was indicted and tried and convicted of the crime of murder, committed by killing one Felipe Garcia on the sixth day of June, A. D. 1870, and was thereafter sentenced to be hanged.

Subsequently an appeal was taken to this court from the judgment, and the warrant for the execution of the accused stayed. No exceptions to the proceedings before, at, or after the trial are noted in the transcript. No motion was made for a new trial, and no statement upon the appeal accompanies the judgment roll. Accompanying the judgment roll is what purports to be the written charge of the court, but it is conceded that the charge to the jury was given orally and not read to the jury, and that the written charge attached to the judgment roll was not placed with the papers until some time had elapsed after the trial. It is not signed by the judge, nor does it appear to be filed with the papers in the case, as required by section 338 (Compiled Laws) of proceedings in criminal cases. The minutes of the court before us do not show that the defendant waived a written charge, and it is conceded that such waiver was not made by the defendant at the trial. The defendant's counsel asks us to set aside the judgment for this and other causes noticed in his brief.

It is unnecessary, as we think, that the court should examine and pass upon the points insisted on as error. We have before held that the failure of the judge to give his charge to the jury in writing, unless such written charge be waived by defendant as provided by the statute, is error, and entitles the accused to have the judgment set aside; and we have seen no good reason to depart from the decisions we have so made.

The question has been raised before us and elaborately argued by counsel, whether upon the reversal of the judgment in this case the defendant is entitled to be discharged, or whether a new trial should be awarded, and it has been argued that he is shielded from being again tried for the offense of which he was convicted by the provision contained in article 5 of amendments to the constitution of the

United States. It is unnecessary to review the authorities upon this point, or even the cases cited by counsel. The majority of the court are of the opinion that when a conviction has been had in a criminal case, and judgment has been rendered, and the judgment is reversed on application of the accused on the ground of error at the trial, he is not shielded by the constitutional provision cited from being tried anew for the same offense. In fact, that no trial such as the law contemplates has been had, and that he has not been in jeopardy in the sense in which the term is used in the constitutional provision cited. We are of the opinion that the judgment in the case should be reversed for the cause hereinbefore expressed, and a new trial had in the district court of the county from which the appeal was taken, and it is so ordered.

TERRITORY OF ARIZONA, RESPONDENT, *v.* MILTON
B. DUFFIELD, APPELLANT.

INDICTMENT SHOULD CHARGE ONE OFFENSE ONLY, and therefore an indictment which in one count charges the offense of resisting an officer in the execution of process, and in another count charges the offense of assault with a deadly weapon upon the person of the same officer, with intent to put him in fear and to compel him to obey an unlawful command of the defendant, is bad.

IN ALL CRIMINAL CASES COURT MUST CHARGE JURY IN WRITING, unless the defendant expressly waive his right to have the charge so given. The judge must commit his instructions to writing and read them to the jury from the original manuscript; and where this is not done, the error is not cured by subsequently reducing them to writing.

APPEAL from the district court of Pima county. The facts are stated in the opinion.

C. W. C. Rowell, for the appellant.

The first count in the indictment charges an offense. See Howell's Code, p. 64, sec. 94.

The second count in the indictment charges another offense. See Howell's Code, p. 55, sec. 50.

Two separate and distinct offenses are charged in the indictment, which is error. See Howell's Code, p. 96, secs. 215, 217.

The defendant had the constitutional right to have arms. See Const.; Howell's Code, page 453, art. 2, amendments; argumentatively, Howell's Code, page 97, sec. 224.

If the indictment be for felony, the defendant must be present at the rendition of the verdict. And the record should so show. Howell's Code, page 112, sec. 384.

Indictment should charge but one offense. See *People v. Garnett*, 29 Cal. 622.

Courts in their charges to the jury should not, either directly or indirectly, assume the guilt of the accused, nor use equivocal phrases which may leave such an impression. *People v. Williams*, 17 Cal. 142. Nor should the court assume a conclusive effect to circumstances, or assume that such circumstances were proven. *People v. Levison*, 16 Cal. 98; *People v. Dick*, 32 Id. 213.

Refusing a proper instruction is not cured by the fact that it was given in substance. *People v. Ramirez*, 13 Cal. 172.

What purports to be a judgment in this case is no judgment at all. See Howell's Code, p. 118, sec. 421; also, *In re Edward Ring*, 28 Cal. 247.

Law is that the charge of the court must be in writing when delivered unless waived. See act of 1867, page 53, sec. 368.

G. H. Oury, for the respondent.

The two counts in the indictment are properly joined. Howell's Code, chap. xi., sec. 217. *Kane v. People*, 8 Wend. 211.

Judgment may be rendered on any one good count. *Id.* 213, 214.

The difference in punishment of the two counts in the indictment is not so great as in grand larceny and receiving stolen goods. Howell's Code, chap. x., sec. 60, 63.

It has been held that counts for stealing and receiving stolen goods may be joined in the same indictment, and the court will neither quash the indictment nor compel the prosecutor to elect upon which count he will proceed. A receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although in his discretion the judge may put the prosecutor to his elec-

tion, he will not do so whenever it is clear that there is only one offense, and the joinder of the counts can not prejudice the defendant. Train and Heard's Precedent of Indictments, pp. 447, 448.

When the defendant was indicted in several counts for stabbing with intent to murder, with intent to maim and disable, and with intent to do grievous bodily harm, it was held that the prosecutor was not bound to elect on which count he would proceed, notwithstanding the judgment is different: in the first count capital, and in the other transportation. Roscoe's Crim. Ev., pp. 189, 190.

It can not be objected in error that two or more offenses of the same nature, on which the same or a similar judgment may be given, are contained in different counts in the same indictment; nor can such objection be maintained either on demurrer or arrest. 1 Wharton's Criminal Law, sec. 415.

In New York, in cases of felony where two or more repugnant offenses are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect on which charge he will proceed; but such election will not be required to be made when several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offense. *Id.*, sec. 423.

The two counts charge substantially the same offense, and not two separate and distinct offenses. The date, the place, and the names of the magistrate and of the person on whom the assault is charged to have been made, being identical in each count, show that the same act is charged, in each count, as the offense. *People v. Thompson*, 28 Cal. 215.

Under our practice, where two offenses charged to have been committed by the same act are both stated in the same indictment, the objection must be taken by demurrer, or it will be deemed waived, and a verdict of guilty of either offense will not be disturbed on that ground. *People v. Garnett*, 29 Cal. 626.

The demurrer in this case does not state any ground for which a demurrer will lie. Howell's Code, chap. xi., secs. 211, 265.

The proceedings of the court are presumed to be regular

and legal until the contrary is shown, and it must be affirmatively shown that error has been committed. *People v. Connor*, 17 Cal. 361, 362.

If the instruction may be correct under any supposed state of facts, as the appellant must show affirmative error, we presume in favor of the judgment below, and will not reverse the judgment when no statement appears. *People v. Levison*, 16 Cal. 100; *People v. King*, 27 Id. 514.

Judges must still, as formerly, state what facts are in evidence, and what are not; or in other words, they may state the evidence pro and con, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to the particular facts or issues, when such is the case. *People v. King*, 27 Id., 513.

The court may charge the jury as to the credibility of a witness. *People v. Cronin*, 34 Id. 204.

The less abstract, the more useful the charge. Jurors find but little assistance in the charge of a judge who deals only in general and abstract propositions which he supposes to be involved in the case, and leaves the jury to apply them as best they may. Id. 204, 205.

When it does not appear that the law has been misrepresented, or the jury misled to the prejudice of the defendant, the judgment will be affirmed. Id., p. 204.

The court did not err in not charging the jury in writing, for the charge is in writing, filed with the papers in the case, and is referred to on the motion for a new trial. See record of the case.

The court did not err in charging the jury as requested by the prosecution, as the charges asked for and given were strictly in accordance with the statutory definition of the offense charged. Howell's Code, chap. x., secs. 50, 94.

The court did not err in charging the jury in regard to the first count.

The act of 1790 punishes the obstruction of every species of process, legal and judicial, whether issued by the court in session, or by a judge or magistrate acting in that capacity, in the execution of the laws of the United States. 1 Brightly's Federal Digest, p. 221, sec. 556, title Criminal Law.

The law referred to is almost identical with the law under which the indictment was found. See 1 Stat. at Large, p. 117, sec. 22, and Howell's Code, chap. x., sec. 91.

To complete the offense, it is not necessary that the person resisting should use or threaten violence. 1 Brightly's Federal Digest, p. 221, sec. 551, title Criminal Law.

The offense of obstructing process consists in the opposing or obstructing the execution of the writ, by threats or violence, which is in the power of the person to enforce. *Id.*, sec. 558.

The officer is not obliged to risk or expose his person, or to proceed to a personal conflict with the defendant. *Id.*, sec. 559.

No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendants. Howell's Code, chap. xi., sec. 223.

After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties. *Id.* sec. 468.

By Court, REAVIS, J. :

This cause was brought into this court on appeal from the district court of Pima county. There are numerous errors complained of on behalf appellant; but we do not feel called upon, nor do we deem it necessary, to examine more than the two following points, urged by counsel for appellant, a proper solution of which, in our judgment, will dispose of this whole matter:

First, it is claimed that the indictment in this cause in the court below contains two separate and distinct charges; and second, that the court erred in delivering an oral charge to a jury when the same should have been in writing, the defendant not having waived his right to have it so given.

There are two counts in the indictment, and the record shows that the jury returned a verdict of guilty as charged in both.

The first charges the defendant with an offense against public justice, to wit, in resisting the sheriff of Pima county in attempting to execute a lawful order of the judge of the

district court for said county, issued while sitting in the capacity of a committing magistrate, and directed to such sheriff for execution. Sec. 94, Criminal Code.

The second charges an offense against the person of an individual, that is to say, with an assault with a deadly weapon upon the person of said sheriff, with intent to put him in fear, and by fear to compel such sheriff to obey an unlawful command of said defendant. Sec. 50, Criminal Code.

We have no doubt of the erroneous joinder of those two offenses in the same indictment. Section 217 of our criminal code provides that "the indictment shall charge but one offense, but it may set forth that offense in different forms under different counts." In the case before us, it can not be claimed, as we think, with any kind of propriety, that the same offense has been set forth in different forms in the several counts therein contained. The offenses are wholly dissimilar, and can have no possible connection. The first is a crime against the public justice of the country, without reference to the person of the officer; while the second is a crime against the person of an individual, without reference to his official character. The other point to which our attention is directed is one of the gravest importance, and demands careful and serious consideration. The criminal code, sec. 368 of the compiled laws, requires the judge in all criminal cases to give his instruction to the jury in writing, unless its being so given shall be expressly waived by the defendant in each particular case in open court. How does the fact stand in this case? The record shows that the presiding judge below charged the jury orally, and that on the day following the return of the verdict, he filed with the clerk a manuscript purporting to be the charge he had given the jury the day before. Was this a substantial compliance with the statute? We think not. In the case of the *People v. Ah Fong*, 12 Cal. 345, the supreme court held, that "the fact that the judge told the counsel he would put the instruction in writing if desired does not help the error." This was after the charge was given. The mischief intended to be prevented by the act might have been partly done. The court further remarked in that case: "In such trials the exact language used is often forgotten or differently un-

derstood by different persons; and in the press of business, with his attention diverted to various matters, it is next to impossible for a judge to remember days after the trial precisely what occurred during its progress." The same principle was decided in *People v. O'Hara*, by that court during the same term. It is true that the language of the statute under which the decisions referred to were made, is not identical with that of the statute of this territory on the same subject; yet we are of the opinion that the spirit and intent of the two acts are for all the purposes of justice substantially the same in effect. When the charge of the court to the jury in a criminal case is required to be given in writing, the presiding judge must first reduce it to writing and deliver its contents to the jury by reading in their hearing from the original manuscript. And it is no answer that the charge of the court was in writing at the time of its delivery to the jury when the judge gives orally from his recollection what purports to be the contents of the written charge. The jury in that case would be left wholly dependent upon the memory of the judge for the accuracy of his statements, however widely they might differ from those he had reduced to writing, and which, when filed, the law makes a part of the record.

The true point of inquiry is, What did the judge charge?

The defendant in a criminal case has an undoubted right to hear every word uttered by the judge to the jury, written at large in the record, and a failure to do so when required, touching the charge to the jury, as the law directs, is error.

The substantial requirements of the law in the particulars mentioned, not having been complied with, on the trial of this cause in the court below, the judgment must be reversed; and as we are of opinion that no valid conviction can be had upon the indictment herein, no new trial will be ordered.

It is therefore directed that the bail of appellant herein be and it is hereby exonerated, and the cause remanded for such further proceedings as shall be necessary and proper according to law.

TWEED, J., concurred.

TITUS, C. J., delivered the following dissenting opinion:

I can not concur in the opinion of the court read in this case, and with due respect to those from whom I differ, the reasons of my dissent are thus submitted.

The opinion of the court alleges two errors as reasons for reversing the judgment—neither of them, however, in the language of the code, which we are here sworn to administer.

The errors as therein stated are: first, it is claimed that the indictment in this case contains two separate and distinct charges; second, the court erred in delivering an oral charge to the jury when the same should have been in writing, the defendant not having waived his right to have it so given.

Our code does not prohibit two charges from being included in the same indictment. It does declare, *Proceedings in Criminal Cases*, sec. 217, that "the indictment shall charge but one offense, but it may set forth that offense in different forms under different counts." Thus it will be perceived that it is two different offenses, and not two different charges, that are thus excluded from the same indictment. These terms are essential in our law, and concerning the substitution of one for the other, it may with becoming deference be submitted as a conjecture, whether the opinion of the court is not predicated on some other code, real or imaginary, different from our own.

Similar substitution of essential terms is also made in its statement of the second error, as it is declared to be. That statement is, "that the court erred in delivering an oral charge, etc., the defendant not having waived his right to have it given in writing."

Our code declares, *Proceedings in Criminal Cases*, *Compiled Laws*, sec. 368: "The charges of the court shall be in writing signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally." (As amended in 1867.)

The difference between the law as thus declared, and the error assigned is radical and essential. The law does not say how the charge shall be delivered, nor that it may not be delivered orally. How can the charge be delivered otherwise than orally, except by silently handing it to the jury in writing? Our law certainly does not require this. Even

if the judge read it to the jury, it must be done *viva voce*. It can be made audible in no other way. The law does not say when the charge of the court shall be in writing. In the course of this opinion it will probably appear that there is a constructive difference between the statement of the law in the opinion of the court and the text of which it is made.

The answer to the defendant's first exception is that it is not true in fact, and ought not, therefore, to avail in law.

The law of Arizona on this subject, which deserves *recitation*, is as follows, Compiled Laws, chap. xi., sec. 217: "The indictment shall charge but one offense, but it may set forth that offense in different forms under different counts." It is not and can not be pretended that duality of counts in the same indictment, under our law as thus cited, is or can be error. Its very letter thus permits as many counts as there are different forms of the one offense charged in the same indictment.

Neither is multiplicity of charges error by the law of Arizona. A charge is an essential and indispensable part of every count in any possible criminal practice, and there must be as many charges as counts in the same indictment.

It is duality of offenses that our law declares to be error, when charged in the same indictment.

Careful inspection, aided by fair analysis, of the indictment in the present case will show that it charges but one offense.

The one act charged in both counts is single, simultaneous, indivisible. No judicial scrutiny, however critical, keen, and technical, can find a single element of more than one act in the two counts of the indictment under consideration. The day, the hour, the very instant; the place, the persons concerned, the occasion; the magisterial order which led to the offenses, the weapon drawn, the withdrawal of the defendant; his refusal to deliver his arms, his defiance—each word and incident of all these, however minute, are the same in both counts. So absolutely true is this, that each of these incidents in the second count is referred to its own identity in the first count by the word "aforesaid," so potent in criminal pleading for the purpose.

The order alone may be taken as the crucial test of this unity and identity. What was it, as described in such count?

“To disarm the said Milton B. Duffield.” It is so described in both counts. More absolute sameness of description is impossible to the human intellect, than is found presented by this one particular of both counts of the indictment. There is no badge, no shade, no scintilla of difference.

No effort of the human mind can find aught in any act or incident of either count of this indictment, different in the slightest degree from the same act or incident of the other count of the same indictment. The judges of this court all know equally well that not on either side was it pretended in the argument of this case that more than one act was charged in the two counts of the indictment.

Trace the act to its personal consequences, and we find the same unity, the same identity.

Who suffered these consequences?

Of the many persons present on the occasion, the indictment describes Peter R. Brady, sheriff, as the person who was obstructed, resisted, and opposed; in the second count the same Peter R. Brady, sheriff aforesaid, as the person who was put in fear and compelled to obey an unlawful order. The act, the objects, the suffering, are the same in both counts. Peter R. Brady is the one man in both counts who suffered the same obstruction, resistance, opposition, the same fear, and the same man who was coerced to the same obedience.

For the first time in the annals of criminal practice, it is submitted, has this, or anything such as this, been construed into such a difference as constitutes a misjoinder in criminal pleading. It makes crime depend, not on the malignity, force, and imprudence of the perpetrator and the sufferings of the victim, but on the minute shades of difference in the remote consequences of his act.

Something more, it is submitted, than the rendition of a certain statute, or the construction of a doubtful one, will be required to find two offenses in the one act under consideration, single, simultaneous, entire, and indivisible as it is.

It is true that this offense, as described in the first count, is punished by a different penalty from the same offense described in the second count of the same indictment. This, however, is no proof of diversity or duplicity. The two parts of the one act which describes this one offense in its

two different forms were framed by the same codifier, enacted at the same time by the same legislature, published in the same code, and in one and the same chapter. Howell's Code, chap. x., secs. 50, 94. True it is that this one offense is described in its two forms in different divisions of the same chapter noted just above, entitled "Of Crimes and Punishments," in one form in the "Fifth Division," entitled "Offenses against the Persons of Individuals," and in the other form in the "Ninth Division," entitled "Crimes and Offenses against Public Justice."

This difference in the division never was intended legitimately to indicate any difference in the degree or character of the crime thus divided. It was copied by Blackstone from Hale's Analysis of the Laws of England, and introduced into our code for the common purpose of convenience of reference. By no judicial torture, however, it is submitted, can this fact be made a sufficient reason for assuming that to include these two forms of the same offense in one indictment by different counts is misjoinder in criminal pleading.

The crime of larceny, as modified by the Arizona statute of 1871, is punished differently from knowingly receiving stolen goods. Compiled Laws, chap. x., secs. 60, 63. They were, too, declared at different times by several legislatures. It will hardly be pretended that these may not be embodied in the same indictment by different counts.

In nearly every state of the Union the crime of burglary and the crime of grand larceny, when perpetrated by the same person or persons, in the same house and at the same time, are really but one offense, and may be included by different counts in the same indictment, though consecutive acts. In California they are excluded, not by judicial construction, but by statute.

The incendiary, who fires a dwelling-house and burns it with its sleeping inmates, may also be indicted by different counts of the same indictment for murder and arson, and this though the firing and killing are consecutive in time.

The man who commits murder on the highway and robs his victim may, in nearly every state of the Union, be indicted in the same indictment by different counts for murder and highway robbery, though these two are consecutive

acts, and not like the one under consideration, entire, simultaneous, and indivisible.

The meaning of our law above cited, concerning the joinder of charges in different counts of the same indictment, is not left to mere conjecture or judicial decision, under our own or some other code here or elsewhere. It was enacted by congress, February 26, 1853, sec. 1, 10 Stats. at Large, 162, that whenever there are or shall be several charges against any person for the same act or transaction, or for two or more acts or transactions committed together, or for two or more acts or transactions of the same class of criminal offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." By the same act it is declared that "any person admitted to manage suits in any court of the United States, or any of the territories thereof, who shall multiply indictments to increase expenses, may be mulcted in the costs." In the *American Insurance Co. v. Canter*, 1 Pet. 511, it was declared by Marshall, C. J., as the opinion of the supreme court, that "in legislating for the territories, congress exercised the combined powers of both the federal and state governments." In *Scott v. Sanford*, 19 How. 393, it was declared by McLean, J., that "the United States in legislating for the territories exercised the whole power on the given subject. This was what was meant by Marshall, C. J., in the *Insurance Co. v. Canter*, and not that the power of congress over the territories is absolute." The same conclusion is supported by *Hunt v. Palao*, 4 How. 589, and *Benner v. Porter*, 9 Id. 235.

By our organic law (of September 9, 1850, sec. 17, 9 Stats. at Large, 452, and February 24, 1863, sec. 2, 12 Stats. at Large, 665), the constitution and laws of the United States, which are not locally inapplicable, shall have the same force and effect in the territory of Arizona as elsewhere in the United States. If applicable at all, they apply, as they are passed, to the territories without any limitation as to time. What more necessarily applicable to the territories than a law to prevent multiplicity of criminal prosecutions, and the anxiety and expense which attend them!

This act of congress, and the authorities cited, show us that it must be regarded as a rule of construction in our criminal practice. There appears no trace of any attempt to limit this act, or to repeal it by any adequate power or authority. It applies here in the same manner, and for the same reasons, as the several recent amendments of the constitution of the United States, the act of congress of July 2, 1864, and 13 Stats. at Large, 374, concerning evidence, and similar acts of congress apply. To the territories over which congress has the sole power of legislation, it applies absolutely, and without any of the limitations which exist in favor of the states, over which the legislative power of congress is restricted.

The recent decision of the supreme court of the United States, in *Dunphy v. Kleinsmith*, 11 Wall. 610, places this beyond a doubt.

By the statute cited, several charges against any person for the same act or transaction, or for two or more acts or transactions connected together by time, place, occasion, and other circumstances, as are the charges contained in the indictment under consideration, may and must be joined by different counts in the same indictment.

The first exception to the indictment of the present case fails, therefore, by the highest exercise of legislative authority.

It fails also by the decisions, which both sides admit to be most instructive if not authoritative in the present case.

Where different offenses are joined in the same indictment by different counts, the misjoinder, if there is one, must be represented to the court before trial by demurrer. *People v. Garnett*, 29 Cal. 622. If this is omitted, a verdict on either count will not be disturbed.

In the futile demurrer filed, argued, and overruled in the present case, misjoinder of two different offenses, in its indictment, was not one of the errors specified. In *People v. Garnett*, 29 Cal. 622, already cited, it was declared by the court, Sanderson, J., "that the objection that two different offenses are included in the same indictment must be made by demurrer before trial. Taken in the present case, on motion in arrest of judgment, it was too late, as held in the *People v. Shotwell*, 27 Cal. 394." In the latter case

it was ruled that this error, if one, must be presented on demurrer. It can not properly be considered on motion in arrest of judgment.

Such is unquestionably the law of California. Neither on this nor on the other points made by the counsel for the appeal do the cases cited by him from that state sustain him.

To the same effect is Wharton's American Criminal Law, secs. 414, 422, referred to in the last case cited above.

Finally, we may cite, as decisive of the present case, from the code proceedings in criminal cases as follows: "Sec. 569. Neither a departure from the form or mode prescribed by this chapter, in respect to any pleadings or proceedings, nor an error or mistake therein, shall render the same invalid, unless it actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

The second error, as it is alleged to be in the opinion of the court, was "the delivery of an oral charge to the jury when the same should have been in writing, the defendant not having waived his right to have it so given."

The departure from the law in the terms of this statement has already been referred to. The record does not show that the charge was not in writing, nor does it show a request on the part of the defendant to have the charge delivered in writing or read from a written manuscript.

The truth is, the charge was in writing when delivered, and with the evidence was occasionally referred to in its delivery, though neither was read throughout. No exception was made at the time, either to the charge or to the manner of its delivery. .

The reasons for a new trial were filed by defendant's counsel three days after the delivery of the charge of the judge. The second of these is as follows: "The court erred in not charging the jury as requested by the defendant in writing." This, however, is an exception to the charge of the judge in not affirming the written charges of the defendant as so presented by him, and not a declaration that the charge was not itself in writing, nor the assertion that a request was made that the charge should be delivered in writing or otherwise than it was. That the charge was in writing when delivered is nowhere denied. No request was made to

read it, nor does the record or any contemporaneous act show it.

The error assigned was suggested by some cases decided in California under legal provisions radically different from those of Arizona.

Our law on this subject has been cited, and may be recited here. It is as follows: "The charges of the court to the jury shall be in writing signed by the judge and filed with the papers in the case, unless the defendant consent in open court for the charges to be delivered verbally."

The law of California on the same subject is as follows, Criminal Practice, sec. 362, cl. 6: "The charge shall be reduced to writing before it is given; and in no case shall any charge or instructions be given to the jury otherwise than in writing, unless by the mutual consent of the parties."

These two legal provisions are radically different, and they must necessarily give rise to judgments and decisions entirely different; and yet the decisions made in California, under a law thus shown to be wholly different from our own, are all that are invoked in fixing the law of Arizona. Its letter, its contexts, its reason, are all abandoned for judgments made there, under a code whose mandates are so different from that which prevails here. Are we here to administer the law of California or the law of Arizona?

If the law of Arizona is to be administered as a whole, no exception can be made to the charge of the judge, whether oral or written, after it is delivered and the jury has retired. If the law of Arizona is not to be administered as a whole, what part of it is to be disregarded or expunged by those who have been sworn to its observance as we have been?

Section 402 of our Law of Proceedings in criminal cases reads as follows: "On the trial of an indictment exceptions may be taken by the defendant to a decision of the court upon matter of law in any of the following cases: 1. In allowing a challenge to the panel of the jury or to an individual juror for an implied bias; 2. On admitting witnesses or testimony; 3. In admitting or rejecting witnesses or testimony, or in declaring any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue."

All these exceptions may be made by the defendant alone. "Exceptions, however, may be taken by the prosecuting officer on behalf of the territory to a decision of the court, upon matter of law, in any of the cases specified in the third division of the preceding section."

There is but one other class of exceptions known to our criminal practice arising before the jury retires; and that is the class of exceptions which occur on written charges, presented by either party, to be allowed or disallowed by the judge, and to be by him indorsed. These are made part of the record by sec. 407 of the title last above cited, and as such they go up on appeal, without being embodied in any bill of exceptions.

Returning to sec. 402 of the same title, what part of it can be disregarded or expunged by this or any other court of Arizona? This court, however, it is submitted, proposes, in its written opinion in the present case, to disregard the first clause of it, which reads, "On the trial of an indictment," and which fixes the time and occasion when exceptions are to be made. Unaided and unexplained by any other rule, this clause would seem to have been embodied in our code for some purpose, and that the one which it literally expresses. There are two well-known rules, one of construction and the other of positive practice, which aid us to determine this. One is, that of every law, all its parts are to be so construed as to co-operate in its general design. The other is as old perhaps as trial by jury, and it is this, exceptions to the charge of the judge shall be made before the jury leave the box or not at all, that the error which the exception suggests, if any, may be corrected at the time. Neither party nor counsel is allowed to conceal his exception and then take advantage of it, if the result of the trial should be against him.

Secs. 404, 405, and 406 of the same title support this conclusion, and show for what purpose the charge of the judge is required to be in writing. These sections declare that the bill of exceptions, containing so much of the evidence as is necessary to explain the law and no more, shall be signed by the judge within ten days after the trial, and shall be filed with the clerk as soon as signed.

This shows that the only reason for requiring the charge

to be in writing is to aid counsel and court to settle the bill of exceptions.

If the first clause of sec. 402, which reads, "On the trial of an indictment," and which refers to all of the sections which follow it, especially the taking of exceptions, means anything, it is that by law no exception to the charge of the judge, after the jury has retired, can be allowed.

The conclusion, therefore, is that the exception to the manner of delivering the charge was made too late, and can not avail to disturb the judgment in the present case.

In support of the same conclusion are the cases cited. *People v. Chung Lit*, 17 Cal. 320; *People v. Garcia*, 25 Id. 531; *People v. Shuler*, 28 Id. 490.

The charge was in writing when delivered, and could have been produced to verify the correctness of its delivery, as well as for the purposes of exception, and settlement of exceptions, then or thereafter. I think the judgment ought not be to reversed.

TERRITORY OF ARIZONA, RESPONDENT, v. WILLIAM
GERTRUDE, APPELLANT,

CHARGE TO JURY IN CRIMINAL CASE MUST BE IN WRITING, signed by the judge, and filed with the papers in the case, and the record in the case must show that such charge was read to the jury, or that the defendant in open court consented that the charge should be given verbally.

APPEAL from the second judicial district. The facts are stated in the opinions.

G. H. Oury, for the appellant.

Under the laws of this territory, the qualification of a juror is, among other things, that he be a citizen of the United States. Howell's Code, 294, sec. 4. In criminal cases involving capital punishment, greater latitude should be allowed the defendant in the preparation and conduct of his defense than in ordinary cases. *Hollingsworth v. Duane*, 4 Dall. 353.

Where an alien has acted the part of a juror without the possible knowledge of the defendant, the defendant having exhausted all the means in his power to discover the fact,

the verdict is illegal, and no judgment can rightfully be pronounced thereon. *Guyskowski v. People*, 1 Scam. 476; *Borst v. Beecker*, 6 Johns. 332; *Presbury v. Commonwealth*, 9 Dana, 203. As to the general principles touching the validity of the acts of an alien juror, see 2 Graham and Waterman on New Trial, 277.

J. E. McCaffry, attorney general, for the respondent.

The record does not show that any one of the jurors in this case was in any respect incompetent; nor is incompetency shown outside of the record. It is simply charged from the fact that one of the jurors was not a citizen, although he had the right to become a citizen at any moment, and supposed he was so. No presumption arises that the defendant was in any manner prejudiced, or did not receive a fair trial. Alienage is a ground of challenge to a juror, but is not a ground for a new trial. *Rex v. Sutton*, 15 Eng. Com. L. 208; 1 Archbold's Cr. Pr. 516. A juror can not object to serving upon the ground that he is an alien. 1 Brightly's Fed. Dig. 507, title, Jury, sec. 9. A new trial will not be granted because one of the jurors was an alien. 1 Brightly's Fed. Dig. 678, title, Practice, sec. 537. That which is ground for challenge to a juror is not always ground for a new trial; for instance, the fact that one of the jurors was an alien or a non-resident. 3 Wharton's Crim. Law, sec. 3220.

By Court, TITUS, C. J.:

This is an appeal by William Gertrude from a judgment of death pronounced upon him by the district court of the second judicial district of Arizona, on a trial for murder.

There was no assignment of error, and the case was submitted on briefs without oral argument. On inspection of the transcript, however, it does not appear that the charge of the judge before whom the case was tried was in writing and read to the jury; nor does it appear that the defendant consented in open court, or otherwise, that the charge should be given verbally.

The law of Arizona, sec. 368, Compiled Laws, p. 137, proceedings in criminal cases, is as follows: "The charges of the court to the jury shall be in writing, signed by the judge

and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally."

This court has decided at its present term, in the cases of the *Territory v. Michael Kennedy*, and the *Territory v. Milton B. Duffield*, felonies not capital, that the record must show on appeal in such cases as these that the charge was in writing and read to the jury, or that the defendant consented in open court that the charge should be verbally given.

It is the opinion of this court, in the present case, that if the record must show these things in cases such as those, *a fortiori* it ought to show the same things in cases such as this, whose penal consequences are so much more severe, and that the record failing to show them in this case, the judgment ought to be reversed.

The judgment of the district court is therefore reversed, and the cause remanded for a new trial.

REAVIS, J., delivered the following dissenting opinion:

The appellant, William Gertrude, was tried and convicted of the crime of murder at the November term, 1871, of the district court of Yuma county.

The proceedings at and during the trial, so far as the record shows, were in all respects regular, and the error complained of on the part of the appellant appears, from the statement on appeal, to have occurred after the sentence and judgment was pronounced and entered of record.

Therefore, so far as the record of the trial is concerned, no question is presented for our consideration, and our attention will be directed to the action of the court below subsequent thereto.

We are asked to reverse this judgment for the following reasons, to wit:

1. Because one of the jurors who sat on the trial of this case was not at that time a citizen of the United States.

2. Because the court below refused to grant a new trial on motion for that purpose made and filed after the sentence of the law and the judgment of the court thereon had been pronounced upon the defendant and entered of record.

The facts, as we have been able to gather them from the record, are as follows: Several days after the judgment, and while the court was still in session, Jacob Fisher, one

of the jurors who tried the case, presented himself in the United States district court, then also in session in that district, and made application and was admitted to citizenship, under the provisions of an act of congress providing for the naturalization of aliens who had served in and had received an honorable discharge from the army of the United States during the late civil war, by a petition in a competent court showing that fact, without further proceedings. The court very soon afterwards adjourned until the fourth Monday of the following December.

The facts, as above stated, having come to the knowledge of counsel for appellant, and the presiding judge being temporarily absent from the county, application was in the interim made to a commissioner of the court for leave to file a motion, *nunc pro tunc*, for a new trial, which was granted.

It is not our purpose to inquire into the power of a court commissioner to grant such leave, as the determination of that question, in my opinion, can in no way affect the result in the disposition that I think should be made of this cause.

The motion, together with the affidavits of counsel for the defendant, was filed at the assembling of the court in December, and a hearing was had thereon. The court below overruled the motion for a new trial, on the ground that it had come too late and could not be entertained, to which ruling counsel for appellant excepted, and the case comes here on appeal. Was it error on the part of the court below in overruling the motion? Sec. 410 of the criminal code provides that a motion for a new trial must be made before the judgment is entered, and this I believe to be the settled authority on the subject. I might stop here; but as the legal status of the juror Fisher has been urged upon our attention with earnestness by counsel for appellant, I am disposed to examine this question, although it is a matter of some doubt whether it is properly before this court for adjudication.

In the affidavit of counsel for appellant, filed in support of the motion for a new trial, we find, among other things, the following statement of facts: "That Jacob Fisher was regularly sworn in as a juror to try said case; that said Jacob Fisher, upon examination under oath, answered affirmatively that he was a citizen of the United States." This

declaration of citizenship seems to have been made by the juror when examined on his oath touching his qualifications to serve as a juror in that case. No challenge for cause could be interposed for that reason, and so far as the court and counsel were advised, Fisher was a competent juror, and was sworn on the panel.

There is nothing on the record to show, nor are we advised by the affidavits of appellant's counsel, that the juror in question willfully deceived the court in order to sit on the trial as a juror, or that he was guilty of moral turpitude in connection therewith.

But what evidence have we before us that Fisher was not a citizen of the United States at the time of the trial? All that we have been able to gather on that point is the following additional statement in the affidavit of appellant's counsel before mentioned, to wit:

"That subsequently [to the trial], to wit, on the eleventh day of November, 1871, said Jacob Fisher appeared before the clerk of the United States district court for the purpose of naturalization; that trial of the above cause was had upon the seventh day of November, 1871; that the time for filing notice of motion for new trial had elapsed before the knowledge of the foregoing facts, to wit, the non-naturalization of said Fisher, had come into the possession of the defendant or his attorneys, or either of them."

These are the facts as they appear in the record on the subject of the citizenship of the juror Fisher.

If the determination of that fact were material in this case, would this court be justified in holding that, because the juror had appeared in the United States district court for the purpose of naturalization, he was, for that reason, incompetent to sit upon a jury that had tried a case a few days before? In other words, is that fact itself conclusive of the alienage of the applicant? I do not think so.

It is not difficult to see how the ends of justice might be always thwarted if a rule so dangerous as this should obtain. There is nothing in the law to prevent any man who has served in the army of his country, and has an honorable discharge therefrom, from going into any court in the United States of competent jurisdiction, and, in the mode provided by the statute, be admitted to citizenship, no matter whether

the place of his birth is beyond the blue water, in another hemisphere, or on the soil of America; and the fact of his having done this is not conclusive evidence that he was not a citizen before.

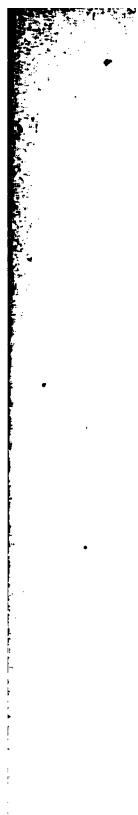
But if we give the appellant the full benefit of the exception and waive all irregularity in its presentation, both in the court below and in this court, is it ground for the reversal of the judgment? I think not.

In the case of *Rex v. Sutton*, 15 Eng. Com. L. 208, it was held that "alienage is ground for challenge, but is not ground for new trial."

The same authority may be found in 1 Archb. Cr. Pr. 516. "A juror can not object to serving on the ground that he is an alien." 1 Brightly's Fed. Dig. 507, title, Jury, sec. 9. "A new trial will not be granted because one of the jurors was an alien." Id. 678, title Practice, sec. 537.

That which is ground for challenge to a juror is not always ground for new trial; for instance, the fact that one of the jurors was an alien or non-resident. 3 Whart. Cr. L., sec. 3220.

That Fisher was a competent juror, under the circumstances, I have no doubt, both upon reason and authority. I am unable to find, on a careful inspection of the record, that any substantial right of the defendant has been prejudiced in the trial of this cause in the court below, and am therefore of the opinion that the judgment should have been affirmed.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1873.

E. IRVINE, RESPONDENT, *v.* SANTERIO LOPEZ, APPELLANT.

NEW TRIAL IN DISTRICT COURT, WHEN GRANTED IN APPEAL FROM JUSTICE'S COURT.—Where the transcript on appeal is obscure or unintelligible, or where error prejudicial to the rights of a party appears on the face of the transcript, or by an assignment of errors by way of affidavit, sustained by the special return of the justice, relating thereto, the appellate court may modify the judgment, if the error be one which, upon inspection of the returns, can be so corrected, or may order a new trial when the error can not otherwise be reached. But if no such error appears either by reference to the transcript, or by assignment of error by way of affidavit, the district court must render such judgment as was had in the justice's court, with the costs of the appeal.

OBJECTION THAT NOTE SUED ON WAS INSUFFICIENTLY STAMPED can not be raised for the first time in the supreme court.

APPEAL from the district court of Maricopa county. The opinion states the case.

G. H. Oury, for the appellant.

A. T. REFS. I—6

John A. Rush, for the respondent.

The above-entitled cause was appealed from the justice's court to the district court of Maricopa county by the defendant, and the only papers sent up to the district court from the court below were the notice of appeal, the appeal bond, the transcript of the justice's docket, and the note upon which suit was brought. It appears that suit was commenced on the fifth day of August, 1872, by the filing of the note and the issuance of summons; that the summons was made returnable on the twelfth day of August, 1872; that defendant failed to appear on the return day of the summons, but made default; and that the court rendered judgment by default against the defendant, and in favor of plaintiff, for the amount of the note, to wit, the sum of two hundred and fifty dollars and costs of suit, from which judgment the defendant appealed to the district court. At the September term of said district court, and before the calling and determining said cause by said court, it was stipulated and agreed by the counsel of the respective parties that the service of said summons, issued by said justice, on said defendant was duly and regularly made. This I believe to be a correct history of the case as submitted to the district court at its September term, 1872.

The defendant by his counsel moved the court to order the cause to be tried *de novo* in the district court, which motion was by the court denied, to which ruling the defendant excepted; the plaintiff then had judgment for the above-mentioned sum, with the costs of the appellate court, whereupon the defendant appealed to the supreme court from the judgment and the order denying the motion for a trial *de novo*, in the district court. I maintain that the action of the district court in denying the defendant a new trial and in rendering judgment in favor of plaintiff was correct and fully sustained by the law, in support of which position I call the attention of the court to the following sections of the compiled laws of the territory of Arizona. Sections 626 and 628 of proceeding in civil cases, page 476, provide what the docket of the justice shall contain. Sections 361 and 362, page 440, direct the action of the district court in matters of appeals.

That the district court was correct in denying the defend-

ant a new trial in this cause seems to me to be beyond question. I understand a new trial in the district court (as contemplated by the statute) to be a retrial of the issues tried in the court below. Now in this case the defendant made default, thereby admitting the allegations of plaintiff—no issues of fact were made or tried in the court below. And the district court could only retry the issues formed and tried in that court. For authority in support of this position the court is referred to the case of *The People ex rel. Jones v. The County Court of El Dorado County*, 10 Cal. 19; also the case of *Funkenstein v. Elgutter*, 11 Id. 328.

Now sections 361 and 362 make it the duty of the district court to take the returns or records provided for by sections 626 and 628 to be sent up by the justice, and from such returns or records to enter judgment, or order a new trial, as the right of the case may appear. It may be said that the district court is invested with discretionary power to enter judgment or to order a new trial. Grant it. It will certainly be conceded that this discretion is and must be a legal discretion based upon the returns or record, and that its exercise must be governed and influenced wholly and alone by the facts as they appear thereon, otherwise the discretion of the court would be arbitrary and according to the caprice of the judge, at one time entering judgment, and at another time ordering a new trial, thus leaving litigants no rule upon which to depend, but subject alone to the caprice of the judge. But be this discretion as it may, this court will not interfere with its exercise unless in case of gross abuse. See *Smith v. Billett*, 15 Cal. 26.

In the district court the counsel for defendant agreed that error appeared upon the face of the note upon which suit had been brought, and which had been sent up by the justice with the returns, in this, that said note was not duly stamped. To this I reply: 1. That the note was not part of the returns or record (see said sections 626 and 628); 2. That by making default he had admitted the indebtedness; 3. Not having raised the objection in the court below, he can not for the first time raise the question in the appellate court. Objections to evidence will not be noticed unless taken below. See *Mott v. Smith*, 16 Cal. 555.

If upon the examination of the returns or record as pro-

vided for by sections 626 and 628, no error or irregularity appeared, I maintain that the district court could not do otherwise in the exercise of a legal discretion than to render such judgment as the right of the case might appear from such returns or records to require.

It has always been the practice of appellate courts to give every intendment in favor of the action of the court below, and it has been held by the appellate courts that they would not reverse a cause upon error of law unless it appeared that the party complaining was injured by such error. See *De Johnson v. Sepulveda*, 5 Cal. 151. I understand the counsel for the defendant to argue in the district court that the appellant was entitled to a new trial in all cases appealed from justices' courts to the district court, regardless as to whether error appeared in the court below or not. In effect taking the position that, notwithstanding the judgment of the court below might be fully sustained by the evidence; notwithstanding the rulings of the court below in matters of law were in every way correct, and every proceeding regular—yet if a party appealed to the district court he was entitled to a new trial in that court. If this position be correct, then why put parties to the expense and trouble of litigating before justices of the peace? Their judgments determine nothing, no matter how regular, fair, right, and just they may be; the issues must be tried anew in the district court upon the application of the defeated party.

By our statutes, justices' courts are not authorized to grant new trials, and it seems to me clear that the legislature intended that the new trials provided for in the district court are appeals from justices' courts, and should be for the same reasons and upon like grounds that new trials may be had in the district courts in causes determined in those courts. For instance, if the verdict or finding of the court be contrary to the evidence, if the court has erred in admitting or rejecting testimony, or in other matters of law affecting the judgment, then the court may grant a new trial.

The sections of the statutes above referred to have provided the means by which the party can make his appeal upon the returns or record sent up to the district court; and unless the returns do show some reason or ground for new trial the district court will not order it.

By Court, TWEED, J. :

This cause comes before us on appeal from the district court of Maricopa county. The action was commenced in the court of a justice of the peace, and judgment by default was rendered in favor of the respondent for the sum of two hundred and fifty dollars and costs. On the appeal in the district court the appellant moved the court for a trial *de novo*, which motion was denied, and judgment rendered in favor of the respondent upon the returns, for such sum of two hundred and fifty dollars, and costs amounting to seven dollars and fifty cents.

Two points are made by the counsel for the appellant: 1. That the court erred in refusing a new trial; 2. That the note sued on was insufficiently stamped, and ought not to have been received in evidence. Section 361, Compiled Laws, page 440, provides that in all appeals from justices' courts to the district court after the returns are filed, the court shall proceed to examine such returns, and render judgment thereon, as the right of the case may appear, without regard to technicalities or imperfections in pleadings, if they do not tend to the prejudice of the rights of any party.

Section 362, same page, provides that "such judgment may be rendered upon the returns, or the court may order the same to be tried anew in the district court as substantial justice may require."

Section 626, page 476, Compiled Laws, provides that "the party appealing may, in his discretion, file with his notice of appeal an affidavit as to any special matters in the proceedings appealed from; and the justice shall return specially as to all matters contained in such affidavits and file such affidavit with his return."

Section 628 provides that papers shall be transmitted to the district court. The section reads as follows: "Upon receiving the notice of appeal and the undertaking, as required in the next section, and on the payment of the costs of the action, the justice shall transmit to the clerk of the district court a copy of his docket in the case, and the undertaking filed, and the notice of appeal." We think the provisions of section 347, page 437, Compiled Laws, under the head of "appeals in general," are also applicable to proceeding on appeals from justices' courts: See sec. 535, page 463,

Compiled Laws. What the justice's docket shall contain is prescribed by section 606, page 474, Compiled Laws. It may be added that justices of the peace are forbidden to grant new trials or to arrest judgments: See sec. 624, p. 476, Compiled Laws.

From the foregoing statutory provisions, it appears to us to be very clear in what cases new trials should be granted in the appellate court. If the transcript be obscure and unintelligible, or if upon its face positive error appears prejudicial to the rights of a party, or if such error appear by an assignment of errors by way of affidavit, sustained by the special return relating thereto from the justice, the appellate court will grant relief: by modifying the judgment, if the error be one which can be corrected in this manner, upon inspecting the returns, and by ordering a new trial when the error complained of can not otherwise be reached. Where no such error appears, either by reference to the transcript or by assignment of errors by way of affidavit, the appellate court can only confirm the judgment, or rather render such judgment as was had in the justice's court with costs of the appeal.

In the case before us there was no assignment of errors by way of affidavit in the justice's court. The transcript from the justice's court is more complete and perfect than such transcripts are usually found to be. If there is in it any defect, it is in relation to the issuance and service of the summons, and such defect, if there be any, is cured by the stipulation that due service of the summons was had in the case. As to the second point made by the appellant, we are of opinion that it is not well made; conceding that the note sent with the papers to the district court was the note sued on, and that under the revenue laws of the United States it was insufficiently stamped, it was too late to raise this objection for the first time in the appellate court, even if the objection would have been good had it been taken in the justice's court—a point we are not called on now to decide.

From a careful consideration of the case under the statutory provisions referred to, we think the judgment should be affirmed, and it is so ordered.

**JAMES P. PORTER, APPELLANT, v. WM. BICHARD
ET AL., RESPONDENTS.**

CLERK HAS NO POWER TO ENTER JUDGMENT BY DEFAULT AFTER ANSWER has been filed, although such answer may be informal or insufficient. Any answer filed in the cause suspends the clerk's power to declare the defendant's default and to enter judgment, and its value as a pleading can be determined by the court only.

JUDGMENT BY DEFAULT ENTERED BY CLERK AFTER ANSWER FILED should be set aside by the court.

NOTICE IS SUFFICIENT when it informs the party entitled to receive it of the thing to be done, and leads him to the place of doing it at the proper time.

VERIFICATION OF ANSWER DOES NOT IMPAIR ITS EFFECT as a pleading, although it is made in a case where the law does not require the answer to be verified.

APPEAL from the district court of the third judicial district. The facts are stated in the opinion.

H. H. Cartter, for the appellant.

Judgment may be had by default if the defendants fail to answer the complaint, as follows: In actions arising upon contract for the recovery of money only: Compiled Laws, p. 409, sec. 152; where a portion of defendants only are personally served: *Id.*, p. 392, sec. 32.

The supreme court has appellate jurisdiction in all cases commenced in a district court, from any order of the district court affecting a substantial right of a party, or in any action or proceeding: See Compiled Laws, p. 375, sec. 4.

Appeals from district courts, when and how taken, and in what cases: See Compiled Laws, p. 438, sec. 349. An appeal lies from an order setting aside a decree in equity, and granting a rehearing. *Riddle v. Baker*, 13 Cal. 295; *Michigan Ins. Co. v. Whitmore*, 12 Mich. 311.

Orders setting aside or refusing to set aside judgments, etc., are, in Wisconsin, appealable: See *Carney v. La Crosse & M. R. R. Co.*, 15 Wis. 503; *Jesup v. City Bank of Racine*, *Id.* 604. So in Nevada: *Ballard v. Purcell*, 1 Nev. 342; *Maynard v. Johnson*, 2 *Id.* 16. In New York: See *Mortimer v. Nash*, 17 Abb. Pr. 229; 3 Estee Pl. 642. An appeal lies from an order of the court below changing the judgment: See *Bryan v. Berry*, 8 Cal. 130; 3 Estee Pl. 641.

In this case the judgment by default should not be set aside, because there was no such motion made in the cause, but the motion was made in another cause, viz., James R. Porter, plaintiff, v. William Bichard et al.—not founded on any notice of a motion filed in this cause—the notice of the motion is entitled: James R. Porter, plaintiff, v. William Bichard and Nicholas Bichard, defendants.

The default in this cause should not have been opened, nor an amended answer allowed to be filed, because there was no motion made for any such action. Defendant admits everything regular up to the entry of judgment, as neither in their notice of motion, or motion, do they ask for any proceeding prior to judgment to be set aside: See 2 Abb. Pr. 591, and note. Errors in rendering a judgment by default can only be corrected by appeal. 3 Estee Pl. 528, sec. 62; *Stevens v. Ross*, 1 Cal. 94.

The only mode to relieve a party from a judgment, on motion, by our statute, is contained in sec. 68, p. 396, Compiled Laws, as follows: "The court may, upon affidavit and such terms as may be just, relieve a party from a judgment taken against him, through mistake, inadvertence, surprise, or excusable neglect." This being the mode fixed by statute, must be strictly followed. By this statute there must be a showing, by affidavit, that the party had a good defense on the merits to the plaintiff's cause of action, and that the judgment was taken by mistake, inadvertence, surprise, or excusable neglect; and although time was granted by the court, no affidavits were filed of any kind whatever, nor any kind of a showing made, although the notice of motion, and motion, purported to be founded on affidavits of the parties. The court therefore erred in granting the order to set aside the judgment.

In delivering his opinion the court below stated that the default and judgment were regularly entered, if there was no answer filed as provided by law, but stated that there was an answer filed in time (referring to answer set forth in transcript, folios 22 to 25 inclusive), therefore the order must be granted (order in transcript appealed from). The paper set forth in said transcript, from folios 22 to 25 inclusive, is not an answer to complainant. It does not purport to be, nor is it intended to be, by the defendants. If an answer at all, it

is the answer of both defendants. Said paper is merely the affidavit of defendant William Bichard to have the time extended in which to answer.

It is not an answer by our statute. By our statute, Compiled Laws, p. 393, sec. 46, the answer of the defendant shall contain, first, in respect to each allegation of the complaint controverted by the defendants, a specific denial thereof, or a denial thereof according to his information and belief, or any knowledge thereof sufficient to form a belief; second, a statement of any matter constituting a counter claim in ordinary and precise language. Not one of the requisites is contained in said paper. It must be treated as a nullity, and the court erred in treating it as an answer.

The allegations of ignorance of the facts alleged will be insufficient to raise an issue, and the facts so attempted to be controverted will be held admitted. *Wood v. Staniels*, 3 N. Y. Code, 152; *Ellon v. Markham*, 20 Barb. 343; *Sayre v. Cushing*, 7 Abb. Pr. 371; *Chapman v. Palmer*, 12 How. Pr. 37; 2 Estee Pl. 695.

In what cases the party may deny the allegation of a pleading from want of sufficient knowledge or information to form a belief: See *Lewis v. Acker*, 11 How. Pr. 163. The court may exercise discretion in setting aside a default, but it must be a legal discretion, founded on sufficient showing. *Woodward v. Backus*, 20 Cal. 137; *Howe v. Independence Co.*, 29 Id.; 3 Estee Pl. 532.

Although an order of the court below setting aside or refusing to set aside a judgment by default rests much in the discretion of the court, and will not be disturbed unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised according to law. *Bailey v. Thaffe*, 29 Cal. 422; 3 Estee Pl. 532.

If the default is regular, as is admitted by respondents, they not moving to set it aside, then the judgment is right, and the court erred in setting either aside, as there was no legal cause therefor.

J. P. Hargrave, for the respondents.

Section 152, page 409, Compiled Laws of Arizona, defines and declares in what cases judgment may be entered by de-

fault, and no discretion is given to the clerk to determine the question of the sufficiency of an answer; he is only authorized to enter the default, and the judgment by default when no answer has been filed within the time prescribed by law; the clerk acts entirely in a ministerial capacity, and derives all his authority from the statute, and his authority can not be extended by implication or intendment of law. *Providence Tool Co. v. Prader*, 32 Cal. 634.

The objection that the motion to set aside the judgment is not properly entitled comes too late, being made for the first time in the supreme court, no objection being made in the court below where the title could have been amended if defective. There is nothing in the objection itself; the names of the parties are sufficiently stated.

This action is in the nature of a bill for an account between partners, as the contract sued upon, and under which the alleged profits were made, shows that the plaintiff and defendants were partners in the execution and carrying out of the business therein mentioned; each to receive a certain fixed proportion of the profits, or bear a like proportion of the losses, each to contribute money and services carrying on the business. Kent's definition of a partnership is this: "It is a contract of two or more competent persons, to place their money, effects, labor, and skill, or some one of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions."

One partner can not sue another at law with respect to partnership transactions, but must file his bill for an accounting, etc. It follows that the complaint states no cause of action, and it was proper for the court below to set aside a judgment entered thereon, although the judgment might be treated as a nullity.

Judgment may be entered by default by the clerk, if no answer has been filed within the time prescribed by law, or such further time as may be granted by the court. *Compiled Laws*, p. 409, sec. 152.

The answer of William Bichard, which was filed before the default was entered, is a good answer in fact, although bad in form, and the clerk had no right to judge of the sufficiency of the answer; if the answer was sham, irrelevant, or immaterial, a motion to strike out was the only remedy.

Compiled Laws, p. 394, sec. 50; 1 Van Santvoord, 592-604. But to treat the paper filed by William Bichard merely as an application and affidavit for additional time in which to file an answer, it is then sufficient to authorize the court to set aside the judgment. A timely application for additional time to answer is an appearance, and pending the application no default can be entered, although the application can not be heard until after the time for answering has expired.

An answer may be good for the purpose of saving default and entirely insufficient to controvert any material allegation in the complaint; as in the case of a verified complaint, an unverified answer may be stricken out on motion, but can not be disregarded by the clerk. *Drum v. Whiting*, 9 Cal. 422; *Grogan v. Ruckle*, 1 Id. 193. Failure to serve a copy of the answer on plaintiff is only an irregularity, to be taken advantage of on motion.

By COURT:

In this case, eight days after service of summons, William Bichard, the one of the two defendants residing without the jurisdiction of this court, filed his sworn and informal answer to the unsworn complaint of the plaintiff, James P. Porter, in which he admits some of the allegations of the said complaint, denies all knowledge of its other more material allegations, avers that the other co-defendant, Nicholas Bichard, a resident of San Francisco, alone can and will make full answer to such complaint, and asks the further time of sixty days to enable him to do so. With this answer on file in the case, the clerk of the district court in which the suit was brought, twenty days after service of summons on the said William Bichard, that is, on the eleventh day of November, 1871, at the instance of the plaintiff's counsel, declared the defendants in default, and entered judgment against them and in favor of the plaintiff, for the sum of thirteen hundred and forty-six dollars, with costs of suit.

Subsequently, on the twenty-second day of June, 1872, the district court, on motion of the defendant's counsel and argument on behalf of both parties, ordered that this judgment should be opened and the defendants allowed to answer. From that order the plaintiff appealed, and now asks

this court to rescind it, and restore the judgment of the clerk, alleging the said order to have been null and void.

In addition to this averment of error on behalf of the plaintiff, the counsel for the defendant, in his notice of motion to open the judgment in the court below, suggested an exception to the jurisdiction of the district court, alleging that the cause of action in the present case was so far an equitable one as to render the common-law remedy there sought inadequate to do justice between the parties. That suggestion was repeated in this court. A brief analysis of the case, however, will show that the district court, under our statutes, is entirely competent to dispose of it in justice to all the parties. The persons concerned in interest are but three; the plaintiff and the two defendants sued as partners; some of the relations of the opposite parties in the case, it is true, are similar to those of partners, but the aggregate relations of the parties are neither numerous nor complex, nor does the case present for solution any equitable element.

The plaintiff's claim is for the net profits of freight, due him as alleged, on a contract between him and the defendants as common carriers, in which the services were to be performed by the respective parties, as provided in the said contract, and the capital contributed, the losses borne, and the profits divided equally between the parties. An account and discovery, in some of their simpler forms, may be required by the plaintiff of the defendants, in the solution of their controversy. The remedial powers of the district court are quite competent to do justice between the parties in this case, hardly less fully, and much more speedily and cheaply, than any mere court of equity. Issues clear and simple can always be extracted from any detail of fact, by complaint and answer under our statutes, and when the issues are thus developed, the parties can be made witnesses for each other, and can be interrogated under oath as exhaustively as the same can be done on a bill in equity for discovery. Their books can be inspected and their accounts unraveled in a case such as this so fully as to satisfy all the exigencies of justice. Nothing in the case, therefore, requires this or the district court to abdicate its common-

law jurisdiction, which had already attached for the dilatory and expensive remedies of a court of equity.

The question recurs upon the validity of the order to open the judgment in the court below. The authority of the clerk to declare the defendants' default is simply clerical, involving no judgment or discretion. The statute, *Compiled Laws*, p. 409, sec. 152, provides that judgment may be thus entered if no answer has been filed with the clerk of the court. Any answer, when filed in the case, suspends the power of the clerk to declare the defendant's default and judgment, however informal, and its value as a pleading must be determined by the judge and no one else. The answer of the defendant had, it seems, been filed by the clerk, who entered the judgment in this case, and had been on his file at least twenty days when the judgment was entered.

The informal answer of William Bichard, as it appears upon the record, though not competent to form a triable issue, was certainly sufficient to entitle the defendants to further time to answer. It would have been so found on application to the court or judge for further time to answer, it would have secured the defendants leave to answer over on a judgment overruling the plaintiff's demurrer to it, and it would have entitled the defendants to a postponement of the trial in order to secure the testimony of Nicholas Bichard as a witness, on the trial of the cause at some future time.

The conclusion therefore is, that the clerk was wrong in entering the judgment of default against the defendants, with the informal answer of William Bichard on file in this case, and that the judge of the district court of the third judicial district was right in rescinding such judgment after it had been entered.

It only remains to notice two more exceptions of the plaintiff's counsel which were adverted to in his brief and on the oral argument of this case; one of these is, that the answer of William Bichard was on oath, while the complaint to which it purports to be responsive was not so, and that it was the answer of both parties though only made by one; the other of these minor exceptions is, that the defendants in the notice of motion to open the judgment and in the proceedings which grew out of it were not described and

entitled as in the complaint, and that hence the notice was insufficient and inoperative and the order of the judgment null and void.

In the notice of motion, the defendants are described as "William Bichard and Nicholas Bichard," and in the motion itself they are described as "William Bichard et al." instead of "William Bichard and Nicholas Bichard, partners, doing business under the firm name and style of William Bichard & Co.," as they are entitled in the complaint, and with the exception noted in the other parts of the proceedings. The title as here indicated was the mere badge of the notice, as explained and applied by the notice itself, to show who sent it, and, like all such notices, does not require the certainty of a pleading.

It is always sufficient where it informs the party entitled to its receipt of the thing to be done and leads him to the place of doing it at the proper time. The title was explained by the body of the notice, and together they left the plaintiff in no doubt of what was meant. Were William Bichard et al., and lawsuits between them and James P. Porter, so numerous that the latter could possibly have misunderstood this notice? Practically, this question would have to be answered in the negative, if there were nothing more.

But on turning to the record we find this admission on behalf of the plaintiff: "I acknowledge service of the within motion. Prescott, Dec. 14, 1871. (Signed) H. H. Cartter, Attorney for Plaintiff." Besides this, the minutes of the case show that the counsel for the plaintiff attended at the hearing of the motion, and resisted the order. This would have cured all defects of notice, if any there were. The verification of the informal answer of William Bichard by affidavit does not in any manner impair its effect. Our Compiled Laws provide, p. 394, sec. 51: "When the complaint is verified by affidavit, the answer shall be verified also." It does not prohibit such verification nor make it detract from the statement in any other case. For the truth is, the verification adds to the sanctity of the statement, and is not matter of exception in the present case.

The informal answer of William Bichard in this case thus commences, "William Bichard for and in behalf of himself and Nicholas Bichard," and thus concludes, "So the defend-

ants in this case respectfully pray this honorable district court," etc. The remainder, and the whole effect, of this informal paper is, to tell the plaintiff, the clerk, and the court that the absent defendant Nicholas Bichard could and would make full answer to the complaint in the case, if time were allowed him to do so. He makes the statement and he prays for the time, as would have been obvious without the commencement or conclusion, on behalf of both the defendants; for both as parties to the suit were interested in it. It is impossible to see how this can impair the effect of this informal answer, or constitute any cause for rescinding the order for opening the judgment in controversy. This court, therefore, is thus constrained to disregard all these minor exceptions.

Some cases were cited in argument, but they have so little application to the present case that their discussion here would add little or nothing to its interest or instruction. They certainly ought not to vary the foregoing conclusions.

The judgment and order of this court, therefore, is that the order of the district court of the third judicial district, opening the judgment of default entered by the clerk of that court in this case, be confirmed, and the case be remanded there for further proceedings thereon.

TERRITORY OF ARIZONA *v.* RICHARD M. HARGRAVE.

DEFENDANT SHOULD BE INFORMED OF HIS RIGHT TO HAVE COUNSEL, in a criminal case, before he is arraigned.

INDICTMENT OUGHT, IN CASE OF FELONY, TO BE READ TO THE JURY that tries the accused.

ERRORS THAT APPEAR NOT TO HAVE PREJUDICED RIGHTS OF DEFENDANT in a criminal prosecution are not sufficient ground for reversal. And the failure to read the indictment to the jury, and the omission to inform the defendant, before his arraignment, that he has a right to have counsel, where the taking of his plea was postponed for two days, when counsel was in fact assigned to him before the plea was made and entered, do not constitute a sufficient cause for reversing the judgment.

APPEAL from the district court of the third judicial district. The opinion states the case.

John Howard and William J. Berry, for the appellant.

John A. Rush, for the respondent.

By Court, TITUS, C. J.:

In this case, the defendant, Richard M. Hargrave, was convicted of the murder of Ygnacio Rubio, at Prescott, in the county of Yavapai, on the eleventh of July last (1872). The defendant was sentenced to death by hanging, on the thirteenth of the same month, and on the sixteenth, notice of this appeal was given by William J. Berry, the defendant's counsel.

The want of authority of the judge of the third judicial district to preside and try the cause was the only exception which the record shows to have been made in the court below. This was rightly overruled at the time, and seems since to have been abandoned as worthless.

No assignment of errors has been made, no brief has been filed, and no argument, oral or written, had in this court. The case comes here by a futile appeal to baffle justice and prolong for a few months the life of the doomed defendant.

The case has been submitted on the record alone, with nothing beyond to aid its examination. On careful inspection, however, the record of this case exhibits no such error as ought to vitiate the verdict in the court below, or disturb the verdict here. The record itself is quite as full as usual, and with an ordinary share of that presumption in favor of the proceedings below, without which no human administration of justice can stand, the present judgment may be maintained.

The record of this case, however, exhibits in the proceedings of the court below, as stated, two omissions and one departure from the course of procedure enjoined by our criminal statutes. It does not appear from the record that the defendant was informed that it was his right to have counsel, before he was arraigned; nor does it appear that the indictment was read to the jury trying the cause. It does appear, however, from the record, that the defendant, on inquiry by the court, was assigned counsel two days after the arraignment, as stated, when he pleaded to the indictment.

These harmless errors, however, ought not to disturb the judgment in the present case, for they do not appear to have prejudiced the defendant, and they are mentioned here only to show that they have not been overlooked in the examination of the record, and as a caution in other cases which may be less carefully tried than this one has obviously been.

Our statutes provide, Compiled Laws, p. 126, sec. 247, "If the defendant appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before he is arraigned, and shall be asked if he desire the aid of counsel."

The same laws provide, p. 134, sec. 331, "If the indictment be for felony, the clerk must read the indictment, and state the plea to the jury."

In this case the arraignment or partial arraignment of the defendant, without counsel, as it appears, did not prejudice him, for the plea, which is really the only accompaniment or immediate consequence of the arraignment requiring the aid of counsel, was postponed for two days after such arraignment, when counsel was assigned the defendant immediately before such plea was made and entered.

The usual, and perhaps better, practice is for the prosecuting officer to read the indictment to the jury, in his opening and statement of the case for the prosecution. Elsewhere this is so much a matter of course that it is always presumed to be done, and requires no statement in the record. As the reading of the indictment is, by our statute, required to be made in a manner exceptional and peculiar, it would seem that the statement of it ought to be thus made in the record. In the absence of such statement, the presumption is that the indictment was read to the jury in the ordinary way. Legal presumption is always in favor of judicial proceedings, until the contrary appears.

The foregoing conclusions in favor of the proceedings in the present case are corroborated by our statute concerning appeals; for the Compiled Laws, p. 148, provide, sec. 468: "After hearing the appeal, the court shall give judgment, without regard to technical error or defect which does not affect the substantial rights of the parties."

The charge of the court in the present case was extremely

cautious, and the utmost indulgence seems to have been allowed the defendant throughout the whole case.

The judgment and order of this court, therefore, are, that the original judgment in the present case shall be carried into execution, by and in pursuance of an *alias* warrant, such as is required in all cases in which the judgment of death is rendered, and that this judgment be entered in the minutes of this court, and a certified copy of the same, with such entry, forthwith remitted to the clerk of the court from which this appeal was taken.

TWEED and PORTER, JJ., concurred.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1874.

JOHN A. RUSH AND ALONZO E. DAVIS, RESPONDENTS, *v.* WASHINGTON FRENCH AND WILLIAM A. LINN, APPELLANTS.

OBJECTIONS, WHAT THE RECORD MUST SHOW IN REFERENCE TO.—Where a party objecting is overruled and he appeals, he must show by the record:

1. What the question was and what answer was given to it, or what the evidence was which was introduced against his objection. 2. He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. 3. He must show what kind of an objection was made, and, to avail him in the supreme court, he must show that the objection, as made, was good.

ID.—Where the party objecting is sustained and the other side appeals, the appellant must show by the record: 1. What question he asked, and what evidence he sought to introduce. 2. Sufficient of the other evidence to illustrate the admissibility of that offered. 3. That the evidence so offered was excluded. 4. That there is reasonable ground to presume that he may have been injured by such exclusion.

SUPREME COURT WILL CONSIDER ONLY SUCH GROUNDS OF OBJECTION as were urged in the court below. Such objection must be specific, not

general. It is error to sustain a general objection, unless it is impossible that the evidence offered can be material in any view of the case, and this impossibility must be apparent.

OBJECTION THAT TESTIMONY OFFERED IS IRRELEVANT, INADMISSIBLE, OR INCOMPETENT, without specifying wherein or how, or why it is irrelevant, inadmissible, or incompetent, will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant, admissible, or competent.

CROSS-EXAMINATION, LIMITS OF.—1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except upon exclusively new matter; and nothing is deemed new matter except such as could not be given under a general denial. 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim, affords no reason why it should be excluded. 3. The party entitled to cross-examine may waive his right to do so at the time, and recall the witness and cross-examine him after he opens his case. 4. The court, in its discretion, may forbid the cross-examining party putting leading questions, when the objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is well founded.

IN EJECTMENT IT IS NOT NEW MATTER to set up defendant's title.

LAW AND CUSTOMS OF MINERS PERMIT LOCATIONS TO BE MADE FOR NON-RESIDENTS of the district, and when so made, the title vests in the person for whom they are made.

DECLARATIONS OF GRANTOR AS TO NATURE OF TITLE HE ASSERTS, made during the time that he claimed title, are admissible, not only against himself, but against parties claiming under him.

FORFEITURE OF MINING CLAIM.—A failure to comply with the local rules and customs of the miners of a district will not work a forfeiture of a mining claim, unless those rules and customs expressly declare that such failure shall work a forfeiture, and such local rules and customs, instead of being liberally construed to establish such forfeiture, will be strictly construed as against it.

LOCAL RULES AND CUSTOMS OF MINERS, INTERPRETATION OF.—The local rules and customs of miners are subject to exactly the same rules of construction and interpretation as any other statute.

LEGAL TERMS MUST NOT BE USED IN INSTRUCTIONS WITHOUT EXPLANATION.
WHEN LOCATION OF MINING CLAIM IS MADE FOR ABSENT LOCATOR, whether with or without authority, or with or without his knowledge, whatever rights are given to him by such location vest in him at once, and even the person locating such absentee can not, without authority, take down the name of such absentee and insert another, even if he do it before the absent locator has knowledge of the fact that he has been located. No express authority is requisite for a person to locate an absent party.

POSSESSORY RIGHTS, WHAT NECESSARY TO MAINTAIN EJECTMENT.—There are two kinds of possessory rights recognized in this territory, one based on the act of November 9, 1864, Compiled Laws, p. 536, the other resting on mere prior occupation. To maintain a right under the first, plaintiff must show a compliance with the statute; to succeed under the second,

he must show prior possession without alienation or abandonment, down to the time of the entry complained of.

FRAUD, WHAT NECESSARY TO DEFEAT RIGHTS OF ABSENT LOCATOR.—In order to render a location void as to an absent locator on the ground of fraudulent intent upon the part of those locating him, it is necessary to bring a knowledge of such fraudulent intent home to such absent locator, and to show an acquiescence in such fraudulent intent upon his part, with the purpose of carrying it out.

IT IS NOT ERROR TO REFUSE INSTRUCTION HAVING NO RELEVANCY to any question involved in the issue. Whether or not it is error to give such an instruction depends upon whether it is calculated to mislead the jury or not.

WHERE ERROR IS SHOWN, INJURY IS PRESUMED, unless the contrary plainly appears.

APPEAL from the third judicial district, county of Yavapai. The opinion states the case.

Joseph P. Hargrave and Coles Bashford, for the appellants.

The court erred in refusing to permit defendants to cross-examine Mary E. Sawyer as to facts showing that the claim was not open to location and appropriation, for the reason that it had been previously located by Linn, to wit: 1. That there was a notice on the monument on which she placed her notice, which she tore down; 2. What she found on the monument at the time she placed her notice there; 3. Was the claim known as the Linn claim? 4. Did she see any work done on the claim at the time she made her location? 5. Was anybody else at work on the claim whilst she was at work there?

This was proper on cross-examination, as showing that plaintiffs' grantor had not located the mining claim, because it was not open for location and appropriation, and for the purpose of sifting the witness as to the evidence she had given. 1 Greenl. 492, 493, sec. 445, *et seq.*; Compiled Laws, p. 524; *Jackson v. Varick*, 7 Cow. 238; *Beal v. Nichols*, 2 Gray, 264; *Jackson v. Feather R. W. Co.*, 14 Cal. 24, 25; *Hawkins v. Borland*, Id. 413; *Marshall v. Shafter*, 32 Id. 190; *Harper v. Lamping*, 33 Id. 641; *Ferguson v. Rutherford*, 7 Nev. 385; *Reed v. Clark*, 47 Cal. 194.

If evidence is pertinent to the issue, and the objection is to the order of proof, the objection must so state.

The court erred in rejecting the evidence offered by defendants to prove that plaintiffs knew that the work on the

claim had been done by Linn, and that they had examined the records and knew of defendants' title and location of this claim.

The court erred in rejecting the following question put by defendants to the witness: "What authority, if any, did you ever give Mr. French to make location of mining claims for you in this territory prior to the location of the Tiger mine?"

The court erred in rejecting the following evidence: Witness testified to the destruction, or loss, of a letter, and defendants offered to prove the contents. 1 Greenl. 595, 596, sec. 558.

The court erred in rejecting the following question: "For what purpose did you request Linn to send you a deed of the premises in controversy, or a power of attorney?" Not offered to impeach deed or power of attorney, but for the purpose of explaining the reason of their execution.

The court erred in rejecting the following evidence: The defendants offered to purge the whole transaction of any suspicion of fraud in the location of the mine and their conduct subsequent thereto, but the evidence was objected to by plaintiffs and excluded by the court, yet the court submits the question to the jury whether the claim was located for the benefit of French and Moreland.

The court erred in rejecting the evidence offered by defendants to prove the declarations and admissions of the grantor of plaintiffs, Mary E. Sawyer, at the time of the pretended location of the mine by her, that she located because Linn was a non-resident, thereby admitting that Linn's claim was otherwise regular and valid, and that she knew it. *Stanley v. Green*, 12 Cal. 148, 162, 163; 1 Greenl., secs. 108, 191; *Bollo v. Navarro*, 33 Cal. 466.

The court erred in rejecting the following evidence: "State what are the general usages and customs of miners in making locations of mining claims in unorganized districts." Witness states that her knowledge is confined to this county. Evidence excluded by the court. "What is the general usage and customs of miners in like places in regard to the discovery of mines in making locations for other parties not present?" Both questions objected to and evidence excluded. Sec. 1, U. S. M'g Law of 1866-72; Yale on Mines, 63, and authorities there cited.

The court erred in refusing to give the following instruction, as requested by defendants: "The failure to comply with the local rules and customs of the district will not work a forfeiture, unless such failure is declared by such rules or customs to be forfeiture." *Yale on Mines*, 64; *McGarrity v. Byington*, 12 Cal. 431; *English v. Johnson*, 17 Id. 118; *Coleman v. Clements*, 23 Id. 248; *Bell v. Bed Rock T. and M. Co.*, 36 Id. 219; *Bradley v. Lee*, 38 Id. 367.

The court erred in refusing to give to the jury the following instruction, as requested by defendants: "If defendants were in possession and occupancy of the claim in controversy at the time plaintiffs' grantor attempted to make her location, no right was acquired by such location." *English v. Johnson*, 17 Cal. 115, 116; *Attwood v. Fricot*, Id. 38; *Yale on Mines*, 64; *Hess v. Winder*, 30 Cal. 355.

The court likewise erred in interpolating the words "located and lawfully." It changes the whole meaning and intention of the instruction, and it became a different instruction.

Besides, it was using legal terms without explanation, which tended to mislead the jury. 3 *Graham and Waterman on New Trials*, pp. 707, 708, 773, 774; *Hilliard on New Trials*, p. 267, sec. 23; *People v. Byrnes*, 30 Cal. 206.

The court erred in refusing to give the following instruction, as requested by the defendants: "If the acts done by and under the direction of Mr. French, for and in the name of Linn, in the location and appropriation of the mine in controversy, would, if done by Linn in person, constitute a good and valid title to the premises, according to the local rules and customs of the district, the subsequent ratification and occupation by Linn make them his own acts, and invest him with all the rights which he would or could have acquired if he had been personally present and had performed those acts in person."

This instruction should have been given without any qualification, and the court erred in adding the following to this instruction: "Unless a valid location by some other person had, in the interval between the location of French and the ratification by Linn, been made and perfected." *Yale on Mines*, 63; *Morton v. Solambo C. M. Co.*, 26 Cal. 527.

The court erred in refusing to give the following instruction to the jury, as requested by defendants: "And a location made by one person in the name of another vests a right in the one for whom the location is made, which can only be divested by his own act or omission or operation of law." *Morton v. The Solambo Co.*, 26 Cal. 527; Yale on Mines, 63.

The court erred in not giving the following instruction to the jury, as requested by defendants: "The law makes the discoverer of a mine the agent of those for whom he chooses to act, and his act becomes their act, regardless of the fact whether the party for whose benefit the location is made has any knowledge of it or not. In such cases, however, the agent making such location has no power afterwards to make any change in the same so as to affect injuriously the right of the party for whose benefit the location was made. Yale on Mines, 63; *Morton v. The Solambo Co.*, 26 Cal. 527.

The court erred in giving the following instruction, as requested by plaintiffs: "That if you believe from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, you will find for plaintiffs, unless the jury believe from the evidence that defendants had a better right to the possession than that of plaintiffs."

The court refused to give the defendants the benefit of a like instruction.

The court erred in giving the following instruction, as requested by plaintiffs: "If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim, without any further consideration, Moreland and French having already located two hundred feet each on the same lode, and that Linn ratified the act for the purpose of making such conveyance, such location was void, as a fraud and evasion of law."

There being no evidence that Linn had ratified the act of location or made such conveyance for the purpose stated in said instruction, it was error to so instruct the jury.

The court erred in giving the following instruction to the jury: "If the location of the mining claim in question was

made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of the said mining claim, without further consideration, Moreland and French having located two hundred feet each upon said lode, then the location was absolutely void, as made in fraud and evasion of law."

This declares the location to be void on the intention of Moreland and French, Linn not being a party to the fraud and not knowing of it.

There was no evidence to sustain the verdict of the jury. There was no conflict of evidence, and the evidence all tended to show that this claim was regularly located by Linn, and that this location was well known by Mary E. Sawyer at the time of her pretended location, and by the plaintiffs at the time of their purchase. A new trial should have been granted. Compiled Laws, p. 415, sec. 195, sub. 6; *Smith v. Athern*, 34 Cal. 511; *Maine Boys' T. Co. v. Boston T. Co.*, 37 Id. 50; *Moss v. Atkinson*, 44 Id. 16.

Rush and Davis and J. E. McCaffry, for the respondents.

The exceptions taken by the appellants in this case refer, for the most part, to questions touching the admissibility of evidence. The exceptions numbered in the transcript 1 to 9 were certainly not well taken. It is now well settled that matters not brought out on direct examination can not be inquired into upon a cross-examination. Story, J., in the supreme court of the United States, said: "Now certainly these statements, if objected to by the defendants, would have been inadmissible upon two distinct grounds: * * * 2. And secondly, upon the broader principle, now well established, though sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making him his own witness, and calling him as such in the subsequent progress of the cause." *Philadelphia and Trenton R. R. Co. v. Stimpson*, 14 Pet. 461; *Floyd v. Bovard*, 6 Watts & S. 75.

The next exceptions (numbered from 9 to 12 in the tran-

script in this case) are fully as untenable. The appellants proved that one of them (Linn) received from the other (French) certain letters; that after the institution of this suit Linn voluntarily and deliberately destroyed the letters. The appellants at the trial offered to prove the contents of these letters by the parol evidence of said Linn.

Thompson, J., said, in a case decided by the supreme court of the United States: "The rule of evidence with respect to the admission of secondary evidence must be so applied as to promote the ends of justice and guard against fraud or imposition. If the circumstances will justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted." *Renner v. The Bank of Columbia*, 9 Wheat. 596, 597; 5 Cond. Rep. 691.

"Secondary evidence," says Heydenfeldt, J., "must always be received with caution, and then not until every means is shown to be exhausted in the effort to procure that which is superior." *Norris v. Russell*, 5 Cal. 251.

The case of *Bagley v. McMickle*, 9 Cal. 446, 447, is, perhaps, more in point than those just cited. In that case Field, J., delivered the opinion of the court. He says: "It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the consent of the owner, such evidence is generally admissible. But if the destruction was voluntary, or was deliberately made by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes, which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary

or inferior evidence is rejected." *Riggs v. Tayloe*, 9 Wheat. 483; *Blade v. Noland*, 12 Wend. 173; S. C., 27 Am. Dec. 126; *Bank of the U. S. v. Sill*, 5 Conn. 106; S. C., 13 Am. Dec. 44. "Parol evidence to show facts stated in certain letters received by the witness will not be admitted; the letters should be produced." *De Tastett v. Crousillat*, 2 Wash. C. C. 132. "The contents of letters must be proved by the production of the letters themselves, unless their absence be accounted for." *Hackleman v. Moat*, 4 Blackf. 164.

The exceptions numbered in the transcript from 13 to 26 and 31 are as untenable. They relate to an attempt made by the defendants to set up an agreement between the defendants Linn and French, different in its terms from that exhibited by the power of attorney and deed from Linn to French.

There is no principle better settled than that parol evidence is not admissible to vary, explain, or contradict an agreement in writing. *Lennard v. Vischer*, 2 Cal. 37; *Conner v. Clark*, 12 Id. 168; *Faw v. Marsteller*, 2 Cranch, 10; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Phillips v. Preston*, 5 How. 278; *Singleton v. Fore*, 7 Mo. 515; *Lane v. Price*, 5 Id. 101; *Rinaldi v. Rives*, 1 Stew. (Ala.) 174; *Falconer v. Garrison*, 1 McCord, 209; *Perrine v. Cheeseman*, 6 Halst. 174; S. C., 19 Am. Dec. 388; *Bennett v. Hubbard*, Minor (Ala.), 270; *Philips v. Keener*, 2 Overton (Tenn.), 329; *Woodruff v. Frost*, 2 N. J. L. 342.

The intention of a principal in a power of attorney can not be shown by parol evidence to differ from that shown by the power. *Peckham v. Lyon*, 4 McLean, 45. Parol evidence is inadmissible to establish a term or condition of a written contract.

By Court, DUNNE, C. J.:

This was an appeal from the third district court, Yavapai county, the judge of the second district presiding. It was an action of ejectment to recover possession of a certain mining claim known as the first north extension of the Tiger lode, or vein, in Tiger mining district, Yavapai county, Arizona territory. Tried at the June term, 1874. Judgment below for plaintiff. New trial refused. Defendants appeal from the judgment and order refusing new trial. Appeal heard January term, 1875.

On the tenth of January, 1871, D. C. Moreland located for himself and others one thousand two hundred feet as the original location on the Tiger vein. On the same day he located two hundred feet on the same vein, and immediately adjoining the original location on the north, for the defendant Linn. This last location constitutes the premises in controversy, and was known as the first extension north of the Tiger claim.

One of Moreland's co-locators in the original claim was the defendant Washington French. French and Linn were very intimate friends. They had traveled and prospected together in Montana, Utah, and Arizona as far back as in 1866. In May, 1869, they were at Fort Whipple, in Arizona, near where the premises in controversy are situated. At this time they separated, Linn going to White Pine in Nevada, where there had arisen a great excitement about mines, French remaining in Arizona. At the time of this separation it was agreed between them that if Linn found anything that would justify it, French was to be located with him, and that if French found anything in Arizona that would justify it, he was to inform Linn, and Linn would return. French had furnished Moreland, the discoverer of the Tiger lode, with supplies to enable him to hunt for new mines, and he was to have an interest in all discoveries made by Moreland for so doing. After Moreland reported the discovery and location of one thousand two hundred feet on the Tiger lode, French requested him to make a location on the same lode for Mr. Linn, which Moreland did, as before stated.

On the same day that the original location of one thousand two hundred feet and the first extension north of two hundred feet for Linn were made on the Tiger lode, Moreland also made another location of four hundred feet on the same claim next north of the Linn location for one Daniel Thorne and one John Cassidy, called sometimes the Thorne and Cassidy claim, and sometimes the second north extension on the Tiger.

This location was made by Moreland for Thorne and Cassidy, under an agreement with Moreland alone that they would deed back to Moreland one half of the ground for his trouble. This agreement was entered into before the location was made, but the agreement was not an agreement to

deed back any particular part of the location of four hundred feet, but generally to deed back one half the ground to pay him for his trouble, and Moreland was the only party known to Thorne and Cassidy in this agreement.

As a matter of fact, the deed presented by Moreland to Thorne and Cassidy for their signatures, and executed by them, was a deed to Moreland and his co-locators in the original Tiger location, and conveyed, not an undivided interest of two hundred feet in the Thorne and Cassidy location, but a segregated interest of the south half of their location, to wit, two hundred feet next adjoining the Linn location.

Plaintiffs attach importance to these facts, claiming that they tend to show a fraudulent intent upon the part of the original locators sufficient to vitiate the Linn location, and to allow the location of the plaintiffs' grantor to come in.

Some thirty days before the Tiger mine was discovered and located, French wrote to Linn, in Nevada, informing him about the arrangement for prospecting, and stating that, if anything was found that would justify it, he would locate him. Two days after the location was made, to wit, on the twelfth day of January, 1871, French wrote Linn, informing him that he had located a claim for him on a silver lead in Bradshaw (meaning this Tiger lode); he told him that the lead was twelve feet wide, assayed one thousand three hundred and fifty dollars per ton, and that he thought that the location made for him (Linn) would be good for ten thousand dollars in less than a year; that as soon as he, French, got the claim recorded, he would send Linn the name and number, and he wanted Linn to send a deed of it back to him, and he would hold it for Linn, who should have all it would bring.

Fifteen days after, to wit, on the twenty-seventh of January, 1871, French again wrote Linn, speaking more enthusiastically than before of the value of the claim, saying that it was from twelve to twenty feet wide, averaged one thousand dollars per ton, smelting process, assayed two thousand dollars per ton; to have no fears that their claim would be worth one hundred thousand dollars in less than one year, and inclosed a deed of Linn's location from Linn to himself, which he requested Linn to sign and forward as soon as

possible, urging as a reason that the local laws were very stringent, and he was fearful of not being able to hold the claim.

In due course of mail, French received the deed from Linn, together with a power of attorney and a letter. The deed and power of attorney were dated the ninth of February, 1871, and were preserved and produced at the trial. The letter accompanying them was not produced. French testified that it was his custom to burn all letters as soon as answered; that he had searched for this letter and could not find it, and that he supposed that it was burned; but defendants were not allowed to give evidence of its contents.

It was not contended by plaintiffs that there had been any failure to do sufficient work upon the Linn location to hold it, nor that, if the Linn location was ever good, it had been forfeited by any non-compliance with the laws or customs governing the district. What plaintiffs claimed was that the Linn location was void *ab initio*, in this, that either there was no sufficient authority in Moreland to make it, or if he had authority, that the location was a fraud upon the government, and therefore void. And now the foundation of plaintiffs' claim appears. One month after Moreland made the location for Linn of the first extension north of the Tiger lode, to wit, on the eleventh day of February, 1871, one Mary E. Sawyer went on the same premises and placed thereon a notice of location, claiming the same ground for herself.

She recorded her notice, did some work on the claim, and on the thirteenth of June following conveyed her claim in said premises to the plaintiffs. A short time after this purchase, plaintiffs put some men at work on the premises. Linn, one of the defendants, who had returned to Arizona about June 21, 1871, came with Moreland and another and prevented Davis and his men from working, and the latter parties then left the premises.

On the twenty-seventh of June, 1871, French, in whose name the title to the Linn location had been standing ever since the deed of Linn to him of February 9, 1841, deeded back one half of the ground to Linn for a nominal consideration of five hundred dollars as expressed in the deed, but no consideration in fact passed.

Linn testified that French retained half of the ground at his, Linn's, request, as security for Linn's indebtedness to him, which had been accruing at various times since 1866, and which he, Linn, believed amounted to about \$1,000 at the time French deeded to him, June 27, 1871.

On July 18, 1872, plaintiffs brought suit in ejectment against defendants. Jury trial. Verdict for plaintiffs. Court set aside the verdict and ordered a new trial. Plaintiffs appealed from the order. The supreme court on appeal held that the verdict was properly set aside. The case went back and the trial was proceeded with. Verdict for plaintiffs. Motion for new trial denied. Defendants appeal from the judgment and order denying a new trial.

Appellants assign forty-five grounds of error, duly saved by a bill of exceptions. The first grounds of error assigned relate to the rulings of the court as to the cross-examination of plaintiffs' first witness, Mary E. Sawyer. Plaintiffs introduced Mary E. Sawyer, who testified that she went upon the premises in person, and placed her notice of location thereon, upon the eleventh of February, 1871; that she had the notice recorded, did some work, and conveyed her title to plaintiffs.

Defendants then asked the following questions:

1. Did you remove any notice, or notices, from the monument on which you placed your notice at the time you placed our notice there?
2. What did you find upon the monument at the time you placed your notice there?
3. Was the claim in controversy known as the Linn claim at the time and prior to the time you placed your notice on it?
4. Did you see any work done on the claim at the time you made your location?
5. Was anybody else at work on the claim whilst you were at work there?

Defendants, under a general objection, were not allowed to ask any of these questions, and the refusal to allow these questions to be asked constitutes the first five grounds of error assigned by appellants.

Plaintiffs introduced John A. Rush, one of the plaintiffs, who testified that he and his co-plaintiff purchased the

premises in question from Mary E. Sawyer, about June 13, 1871; that on the day of the purchase, or day prior, he and his co-plaintiff went on the premises, with a view of purchasing; then purchased, and afterwards put men to work. Cross-examined: "When I went to examine the claim I saw that some considerable work had been done. I do not know by whom it was done."

6. Defendants were then prohibited from asking the following question, and assign such refusal as the sixth ground of error: "Were you not informed by your grantor that the work you saw on the claim had been made by Linn and French before your purchase?" Alonzo E. Davis, the other plaintiff, was then introduced by plaintiffs, and on direct examination testified to the same effect as Rush, as to visiting the premises prior to the purchase; that he put men to work, who were driven off by defendants; that no one was on the claim at the time his men went to work; that there was nothing to show that any one was in possession at the time; that the lands were considered public mineral lands at the time; and that he did not know of Mr. French's being in possession of the premises at the time. Cross-examined: "When I went with Mr. Rush to examine the ground, I saw a cut that had been run into the hill toward the lead."

7. Defendants were then prohibited from asking the following question: "Do you know by whom the work in the cut was done?" wherein they assign error 7.

8. Defendants were prohibited from asking, "Did you examine the district and county records before purchasing in regard to the adverse claim to Mary E. Sawyer, of Linn and French, to the premises in controversy?" Assigned as error 8.

9, 10. Defendants introduced William A. Linn, one of the defendants, who on direct examination testified as to his long friendship and intimacy with French, and as to the correspondence between him and French relative to the premises in question. Exceptions 9 and 10 were taken as to proving the contents of this correspondence, but are not pressed.

11. Defendants were prohibited from asking, "What authority, if any, did you ever give Mr. French to make location of mining claims for you in this territory, prior to the location of the Tiger mine?" wherein is assigned error 11.

Defendants introduced Washington French, one of the defendants, who, among other things, testified to his relations and correspondence with Linn. The letter of French to Linn, of January 27, 1871, asking Linn to send a deed of the ground, was produced. Witness was asked: "What did you receive in answer to this?" Answer: "I received a deed from Linn to two hundred feet of ground; also a power of attorney and a letter at the same time. I have not got that letter now. I suppose that it is burned up. I have searched for it, and can not find it. It was my custom, as I have stated, to burn all letters as soon as answered, and I suppose that this one was burned."

12. Defendants offered proof of the contents of this, as being instructions for the use of the deed and power of attorney accompanying it. Disallowed, wherein is assigned error 12.

13. Question by defendants: "For what purpose did you request Linn to send you a deed of the premises in controversy?" Disallowed. Assigned as error 13.

14. Question by defendants: "Did you have or claim any pecuniary interest in the ground in controversy by virtue of the deed from Linn to you?" Disallowed. Assigned as error 14.

15. Question by defendants: "Why did you have the deed and power of attorney both recorded?" Disallowed. Assigned as error 15.

16. Question by defendants: "Did you offer to reconvey to Linn the entire interest in the claim in controversy, on his return to Prescott?" Disallowed. Assigned as error 16.

William A. Linn, one of the defendants, recalled. Direct examination. Witness is shown the deed for the premises in question and the power of attorney from himself to French. He said that he executed them, and that there was no consideration from French for the deed.

17. Question by defendants: "For what purpose and what induced you to execute the deed and power of attorney to French of the claim in question?"

18. "Did you execute the deed to French at his request, as stated in his letter of January 27, 1871, and for the purpose therein mentioned?"

19. "For what purpose did you execute the deed to French, dated February 9, 1871?"

20. "For what purpose did you execute a power of attorney at the time you executed the deed of the claim in question?"

21. "Did you execute the deed for the reasons stated in the letter of January 27th?"

22. "What induced you to execute the deed of February 9, 1871, to French?"

23. "Did you expect to receive from French all the benefits derived from the claim deeded?"

24. "Did you at any time have any agreement or understanding with French by which you were to deed to French this ground or any portion of it for his own benefit?"

25. "Had you at any time before the location of this claim any agreement or understanding with French by which he was to cause locations of mining claims to be made for you and you to deed them to him, for his benefit?"

26. "Was the letter from French to you, dated January 27, 1871, the only inducement and consideration upon which you executed the deed to French, of February 9, 1871?"

All these questions, from 17 to 26, were objected to generally, and were disallowed, and therein are assigned errors 17 to 26 inclusive.

Defendants introduced E. S. Junior, who on direct examination testified that he knew all the parties to, and most of the circumstances of, this case; that he went himself on the premises for the purpose of relocating them a day or two before Mary E. Sawyer placed her location there; saw Linn's notice of location on the claim at that time; knew Mary E. Sawyer, plaintiffs' grantor; had a conversation with her as to her location of this claim about the time her location was made.

27. Question by defendants: "State what that conversation was."

28. "Did you have this conversation with Mary E. Sawyer on the same day that she placed her notice on the claim?"

29. Defendants offered to prove by this witness that at the time Mary E. Sawyer placed her notice on the claim in controversy, that she said that she relocated and jumped the claim, because Linn was a non-resident of the territory and

was not entitled to hold a claim. Questions 27, 28, and 29 objected to generally, and objection sustained; wherein appellants assign errors 27, 28, and 29.

Alonzo E. Davis, one of the plaintiffs, was called as a witness for the defense. On direct examination the first question was:

30. "Did you not, prior to the purchase by yourself and Rush of Mary E. Sawyer of the claim in controversy, examine the records in relation to the adverse claim of the Linn location?" General objection, and question disallowed. Assigned as error 30.

Witness then stated, in response to other questions, that he was not certain whether he stated on the former trial that he had examined the records prior to purchasing, but he knew in some way that the ground had been taken up for Linn and deeded to French, but that it was considered as a bogus claim.

31. "Did you buy the claim from Mary E. Sawyer because you supposed the conveyance from Linn to French was a bogus affair?" Disallowed. Assigned as error 31.

William C. Collier for defense. Direct examination.

"Have been engaged for ten years locating claims here. Am acquainted with the general custom of miners around here in making locations where no organization exists. My knowledge is confined to this county. Am not acquainted with them elsewhere."

32. Defendants asked: "State what are the general usages and customs of miners in making locations of mining claims in unorganized districts?" Disallowed under a general objection; and therein defendants assign error 32.

The record shows that the premises in question were situated in the county of which witness spoke.

Fred Henry for defense. Direct examination.

"My occupation has been that of mining and prospecting since 1858. I have prospected in what was then Utah, afterwards Nevada, from 1858 to 1861; since then, I have been in California, Idaho, Washington territory, New Mexico, and Arizona. I am acquainted with the usages and customs of miners in making locations in unorganized districts."

33. By defendants: "What is the general usage and

custom of miners in like places (unorganized districts) in regard to the discovery of mines in making locations for other parties not present?" Disallowed; wherein defendants assign error 33.

34 and 35 are not pressed by appellants.

Counsel for defendants asked for the following instructions:

1. Plaintiffs must recover, if at all, on the strength of their own title; and having based their title on a location under and by virtue of the local rules and customs of the district, must not only show a compliance with these rules and customs, but that the claim was subject to location and appropriation at the time they, or those under whom they claim, sought to locate the same. Given.

2. That if the claim or mining ground in controversy had been previously ("lawfully," inserted by the court) located and appropriated by defendants, and those from whom they derive their title, in accordance with the local rules or customs of the district or vicinity, plaintiffs can not recover by virtue of a subsequent location of the same claim or ground, unless they show a voluntary abandonment of the claim, or a failure on the part of the first locator to comply with the local rules or customs of the miners of the district. Given. *And that such failure was of itself declared to be a forfeiture of the claim.* Refused.

The counsel for defendants then and there excepted to the insertion of the word "lawfully" in the first clause of this instruction, and to the refusal of the court to give all of the above instruction; and assigned therein error 36.

3. That the right to locate and acquire title to the mineral lands belonging to the United States is not restricted to the inhabitants or residents of any particular district or portion of the country; and unless it is shown that the local rules and customs require the locator to be personally present to make the location, or to do some act in person, before acquiring a right to a mine or claim on a mine, all that is required to be done may be done by an agent or servant, for and in the name of his principal or employer, with the same force and effect as if done by the principal in person. Given.

4. If the defendants were ("located and lawfully," inserted

by the court) in the possession and occupancy of the claim in controversy at the time plaintiffs' grantor attempted to make her location, no right was acquired by such location. The court gave the above instruction after inserting the words "located and lawfully," to the insertion of which counsel for the defendants then and there excepted. Assigned as error 37.

5. To entitle plaintiffs to recover on the strength of possession alone, they must show an actual prior possession and occupancy without interruption for a sufficient length of time to show an appropriation to the exclusion of all the world; a mere scrambling possession, with occasional acts of ownership and control, is not sufficient. Given.

6. If the acts done by and under the direction of French for and in the name of Linn in the location and appropriation of the mines in controversy would, if done by Linn in person, constitute a good and valid title to the premises according to the local rules and customs of the mines and miners of the district, the subsequent ratification and occupation by Linn makes them his own acts, and invests him with all the rights which he would or could have acquired if he had been personally present and performed those acts in person. Given. *Unless a valid location by some other person had in the interval between the location of French and the ratification by Linn been made and perfected.* Added by the court.

The court gave the above instruction after adding the italicized clause at the end thereof—to which addition the counsel for defendants excepted then and there, and therein assign error 38.

7. No express or written authority is necessary to constitute an agent to make a location of a mining claim. Given. *And a location made by one person for and in the name of another vests a right in the one for whom the location is made, which can only be divested by his own acts or omissions or by operation of law.* Refused. The court added: "But some authority either express or implied must exist, or the agency must be ratified before other valid claims intervene." To the refusal of the court to give the instruction as asked, counsel for the defendants then and there excepted, and assigned error 39.

8. The law makes the discoverer of a mine the agent of those for whom he chooses to act, and his act becomes their act, regardless of the fact whether the party for whose benefit the location is made has any knowledge of it or not; in such cases, however, the agent making such location has no power afterwards to make any change in the same so as to affect injuriously the right of the party for whose benefit the location was made. A failure to comply with the local rules and customs of the district will not work a forfeiture, unless such failure is declared by such rules and customs to be a forfeiture. The court refused to give the above instruction, to which counsel for defendants excepted and assigned error 40.

9. It is not necessary that the record of a mining claim should be an exact copy of the notice placed upon the claim. If the record is substantially the same, describing the same ground by the same name, and of the same date, and substantially the same as the notice on the claim, it is a sufficient record.

Plaintiffs asked for the following instructions:

1. That if Moreland acted as the agent of Linn in locating the ground in controversy and located in the name of Linn, the defendants to avail themselves of such location must show that Moreland at the time of making such location had written authority from Linn to make such location. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

2. That the location of a mining claim upon the public mineral lands of the United States under the laws of the United States is the creation of an interest in lands within the purview of the statute of frauds, and an agent can not make such location for his principal, unless he be thereunto authorized by his principal, in writing. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

3. If the jury believe from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, they will find for plaintiffs, unless the jury believe from the evidence that defendants had a better right to the premises than the plaintiffs. Given. Assigned as error 41.

4. If the jury believe that French had authority to act as the agent of Linn in locating the ground in controversy, that authority could not be delegated by French to any other person without express authority from Linn to do so. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

5. If Moreland had the authority to make the location in question, defendants, in order to avail themselves of it, must show that the location was made in accordance with the local rules and regulations of miners in the mining district in which the said location was made, and that the notice of location was transmitted to the county recorder within sixty days after the location was made. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

6. If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim without further consideration, Moreland and French having already located two hundred feet each on the same lode, and Linn ratified the act of location for the purpose of making such conveyance, such location was void, as made in fraud and evasion of law. Given. Assigned as error 42.

7. That if the jury believe from the evidence that Linn and French were partners, and that French located the ground in controversy in the name of, and for the individual use of, Linn, and not for Linn and French, then the partnership conferred no authority upon French to locate for Linn. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

8. That no person can make more than one location upon the same lead or lode. The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

9. A person having made for himself, or other person or persons, a location for mining purposes on a quartz lead or lode, can not afterwards make either for himself or any other person, another location on the same lead or lode.

The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

The court also gave to the jury the following instructions:

1. A party locating a mining claim upon the public lands of the United States, and complying with the laws of the United States and with the local rules and customs of miners in the mining district in which the claim is situated, in locating and holding such claim, acquires a right to the possession of such claim against every one except those who have legally appropriated such claim prior to such location.

2. If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of the said mining claim, without further consideration, Moreland and French having already located two hundred feet each upon the same lode, then the location was absolutely void, and made in fraud and evasion of law. To the above, counsel for defendants then and there excepted.

3. A *bona fide* possession of the premises by plaintiffs, of however short duration, prior to an ouster by defendants, will entitle plaintiffs to recover, unless defendants show a better right to possession than that of the plaintiffs. To the above, the counsel for defendants then and there excepted, and assigned as error 43 the giving of said second and third instructions.

44. That it was error to refuse a new trial in this: that the evidence is insufficient to justify the verdict.

45. That it was error to refuse a new trial in this: that the verdict is against the law as given to the jury by the court.

In approaching the consideration of this case, we find a multitude of objections to evidence certified from the court below, and we deem it well to call attention to some general rules on the subject. In doing so, we do not mean to reflect on the practice of attorneys in this particular case; on the contrary, we feel more like complimenting the counsel on both sides for the extraordinary care bestowed on the case, and for the very able briefs filed, which have rendered the

examination of the questions raised more a pleasure for the court than a task. But it is astonishing how many appeals are lost through a defect in the transcript as to the presentation of the grounds of objection to evidence. Case after case occurs in every state where the whole benefit of an objection is lost by an imperfect record on the matter of exceptions to evidence. The mere exception itself is generally taken correctly, and we think, as a matter of fact, that the proper grounds of objection are generally stated on the trial and strenuously urged, but when the record comes to the supreme court the transcript fails, with wonderful frequency, to show what grounds of objection were urged, and the benefit of the exception is lost.

This, doubtless, arises in a great measure from the absence of phonographic reporters, and the disinclination of all parties to stop in the midst of a trial, and keep a judge and jury waiting, in order that counsel may clearly settle their exceptions. We know that it is very hard to do this in the absence of short-hand writers, but until a more enlightened public opinion furnishes us with these wonderful aids to the dispatch of business, we must plod on in the old cumbrous way and let juries possess their souls in patience, as best they may.

We hope the consideration we have given this subject, and the references we have made to adjudications on the point, will enable the bar of this territory to avoid many difficulties of this kind in the future.

The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: 1. When the party objecting was overruled and he appeals. 2. When the party objecting was sustained and the other side appeals.

In the first case, where the party objecting was overruled and he appeals, he must show by the record: 1. What the question was, and what answer was given to it, or what the evidence was which was introduced against his objection.

This is important, because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible, but he

must show that the evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling.

2. He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured, but where error is shown, injury will be presumed, unless the contrary clearly appears.

3. He must show what kind of an objection was made, and to avail him here he must show that the objection as made was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party must make depends upon the nature of the objection. If the party objecting interpose merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this, we can not in reason require him to go. He should defend himself against the particular attack made, but we can not ask him to fortify himself against all possible attacks which might have been made. In the second case, where the party objecting was sustained, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: 1. What question he asked or what evidence he sought to introduce; 2. Sufficient of the other evidence to illustrate the admissibility of that offered; 3. That the evidence so offered was excluded; 4. That there is reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds of exclusion.

WHAT GROUNDS OF OBJECTION WILL BE CONSIDERED ON APPEAL.

The supreme court, in examining a question as to whether a ruling of the court below on an objection to evidence was correct or not, will not consider any other grounds of objection to the evidence than those urged in the court below. This rule is of universal adoption in the courts of this country. We do not see that it makes any difference which

party it is that complains of the ruling, the question not being one of parties, but simply whether the ruling was correct or not. Of course no one can complain of the ruling unless he appeals. *Martin v. Travers*, 12 Cal. 245, and numerous cases there cited; *People v. Glenn*, 10 Id. 32, and cases hereinafter cited under the question as to what is the effect of a general objection.

The reason of the rule is apparent. Courts are instituted and judicial proceedings are granted for the purpose of securing speedy justice. The right of parties to be protected against improper evidence is mutual, and is secured in the most ample manner. All that is required is that the party complaining state a proper objection, and if the judge below refuse to exclude, when the proper objection is made, or exclude when the objection made is not proper, relief is granted here on review. But a party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection. 2 Bac. Abr. 529; see also *Martin v. Travers*, 12 Cal. 245; *Frier v. Johnson*, 8 Johns. 496; *Jackson v. Cadwell*, 1 Cow. 622; *Whiteside v. Jackson*, 1 Wend. 418; *Waters v. Gilbert*, 2 Cush. 29; *Covillaud v. Tanner*, 7 Cal. 38.

He must not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide hap-hazard, or else stop the trial of the cause, with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of the legislature, to see if they can discover any valid objection to the testimony. The opposing counsel can make no reply to a general objection, except to throw the whole responsibility upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his time and place to use them. Such

things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice.

It may be urged that where a judge below has ruled on an objection, we should uphold his ruling, if any reason can be found to sustain it, even though it be a different one from that assigned, as in the case of a judgment. It is true that we must do so when the ruling is correct, but the very question raised by the exception is whether the ruling is correct or not. We are driven at once to the question, Did the party objecting state at the time good grounds of objection? If he did, of course his objection must prevail; if he did not, of course it must fall.

WHY GROUNDS OF OBJECTION SHOULD BE STATED.

The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time—and thus appeals could often be saved, delays avoided, and substantial justice administered.

Counsel are held to the grounds of objection stated at the time they call for a decision of the judge below; because they are supposed to know the law of their case, and if they do not offer other objections they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and if it goes the other way, move to exclude it; neither must they be permitted to plead inattention as an excuse. It is their duty to be attentive on a trial, and if they misapprehend the difference which

neglect, they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out other objections and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case as presented were correct or not.

EFFECT OF A GENERAL OBJECTION.

A general objection is unworthy of consideration. This is stating the rule very broadly, but perhaps the only limitation it can ever require is in those exceedingly rare cases where it is apparent on the face of the proposition that it is impossible the evidence is or can be made available for any purpose. As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and it is clear that the defect can not possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient. But of course such cases will be very rare, and a prudent practitioner will hardly risk any point on a general objection. *People v. Apple*, 7 Cal. 290; *Kiler v. Kimbal*, 10 Id. 267; *Martin v. Travers*, 12 Id. 245; *Baker v. Joseph*, 16 Id. 180; *Mabbett v. White*, 12 N. Y. 451; *Kansas P. R. R. v. Pointer*, 9 Kan. 629; *Wilson v. Fuller*, Id. 186; *Walker v. Armstrong*, 2 Id. 226; *Jackson v. Cadwell*, 1 Cow. 639; *Michel v. Ware*, 3 Neb. 235; *Johnson v. Adleman*, 35 Ill. 265; *Carroll v. City of Benicia*, 40 Cal. 390; *Rosenheim v. Am. Ins. Co.*, 33 Mo. 230; *Greene v. Gallagher*, 35 Id. 226; *Clark v. Conway*, 23 Id. 438; *Grimm v. Gamache*, 25 Id. 41; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Graham v. Anderson*, 42 Id. 514; *Howell v. Edmonds*, 47 Id. 79; *Moser v. Kreigh*, 49 Id. 84; *Hanford v. Obrecht*, Id. 146; *Harmon v. Thornton*, 2 Scam. 351; *Gillespie v. Smith*, 29 Ill. 473; *Sargeant v. Kellogg*, 5 Gilm. 273; *Swift v. Whitney*, 20 Ill. 144; *Buntain v. Baily*, 27 Id. 410; *Johnson v. Adleman*, 35 Id. 265; *Tozer v. Hershey*, 15 Minn. 261; *Weide v. Davidson*, Id. 330; *Schell v. National Bank*, 14 Id. 47; *Gilbert v. Thompson*, Id. 544; *Bickham v. Smith*, 62 Pa. St. 45; *Baldorff v. Bank of Reading*, 61 Id. 179; *Moore v. Bank of Metropolis*, 13 Pet. 302; *Elliott v. Peirsol*, 1

thir 328; *Camden v. Doremus*, 3 How. 515, 530; *Hinde v. Longworth*, 11 Wheat. 199.

EFFECT OF SPECIAL OBJECTION.

An objection that the testimony is irrelevant without specifying wherein or how or why it is irrelevant will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. *Dreux v. Domec*, 18 Cal. 83. An objection that the testimony is inadmissible may be disregarded. It amounts to no more than the assertion that the evidence is illegal. The objection should fully and specifically point out how it is inadmissible. *Leet v. Wilson*, 24 Id. 402. When an objection is that the evidence offered is incompetent and illegal, it is the duty of the court to overrule it if the evidence was admissible for any purpose. *Sneed v. Osborn*, 25 Id. 627; *Bohanan v. Hans*, 26 Tex. 450. An objection that evidence is incompetent does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. *Kansas R. R. v. Pointer*, 9 Kan. 627. Where a witness was clearly incompetent by express statute as to certain conversations by reason of the death of a party, an objection to the evidence as irrelevant, immaterial, or improper was held not sufficient. There must be a specific objection that the party is not a competent witness, because the person with whom he transacted the business, and about whose statement he proposes to testify, is dead. *Cornell v. Barnes*, 26 Wis. 480, June term, 1870.

This case is somewhat interesting, from the fact that the court, while adhering to the law, expressed its personal regret that the proper objection had not been made, the party deceased having been so well and favorably known to the court that it would not believe the charges made against him, even though the evidence had been properly admitted. The objection was that the evidence was immaterial, irrelevant, and improper. But it was very relevant, very material, and very proper if it were competent. But the question of its competency was not raised, and therefore it was error to exclude it.

An objection to a deposition for substance raises no ques-

tion as to competency, but the party objecting subsequently raised the point of competency, just as the judge was going to charge the jury, asking to have the evidence excluded for incompetency. Refused, and refusal upheld. On appeal, the court said it would be unjust to the plaintiff to allow the defendant, after the testimony is closed and the court ready to charge the jury, to raise the question of competency when he had placed his objections upon some other grounds at the time the testimony was introduced. If the defendant had objected for incompetency at the time, the plaintiff might have availed himself of other testimony on the points. *Molloy v. Head*, 43 Vt. 636.

An objection was made that certain evidence was incompetent. The judge refused to entertain the objection unless accompanied by a specification of grounds upon which the party objecting claimed that the evidence was incompetent. Exception to such ruling. On appeal, the supreme court declared: "We think the judge very properly refused to entertain the objection. A judge presiding at the trial of a cause is not to be burdened with the duty of searching for objections to an inquiry put by counsel which the opposing counsel is himself unable to discover, or which, if apparent to his own mind, he sees fit to conceal for no other purpose apparently, than to prevent a full consideration of the objection, and with the ultimate intent of taking advantage of an error, in case of defeat, which might have been avoided if his views of the matter had been fairly and candidly expressed at the proper time." *Bundy v. Hyde*, 50 N. H. 121, July term, 1870.

An objection that evidence was irrelevant, incompetent, and immaterial was held to be merely a general objection, and not good if the evidence was admissible for any purpose. *Voorman v. Voight*, 46 Cal. 397.

There are numerous authorities and adjudications in support of the natural common-sense proposition that a general objection raises no issue, except it is as to whether the evidence would under any circumstances or for any purpose be admitted; and that a special objection raises no other issue than the particular one tendered. They are also in support of the proposition, that if a judge overrule a general objection, he must be sustained, unless it clearly appears

that under no possible circumstances in the case could the evidence come in; and that if he sustain a general objection, he must be reversed if it is possible that under any view of the case the evidence might be admitted. That if he overrule a special objection, he must be sustained if the particular objection is bad, no matter how many other good objections might have been offered; but if he sustain a special objection, he must be reversed if the special objection urged is not good, notwithstanding that there may be other objections, which, had they been urged, would have sustained his rulings. The policy of the law is, evidently, to admit evidence unless a good objection to it is clearly shown.

All the equities and all the presumptions are, not that a ruling is correct, but that evidence offered ought to come in, unless at the time it is offered good reason is shown why it should be excluded. "Competency is presumed until the contrary is shown." *Hall v. Gittings*, 2 Harr. & J. 112, 120, 121, and the cases cited by Chase, C. J., at the last page; *Stoddert v. Manning*, 2 Harr. & G. 147; *Callis v. Tolson*, 6 Gill & J. 80, 91; *Saxon v. Boyce*, 1 Bail. 66; *Smith v. White*, 5 Dana, 382, 383.

LIMITS OF CROSS-EXAMINATION.

The first five assignments of error may be considered together, they being all based on the refusal of the court to allow defendants to cross-examine plaintiffs' witness as to what she saw and did with regard to an alleged former location, at the time she claimed to have made a mining location on the same premises. The witness testified in chief that she went upon the ground, put up a notice, and did some work. On being cross-examined, she said she did not erect any monument, but put her notice on a stone monument already there, by lifting a rock, placing her notice under it, and then replacing the rock. She was then asked by defendants whether she removed any notice from the monument at the time; what she found on the monument at the time; whether the premises were not known as the Linn claim at the time; whether she saw any work done on the claim at the time; and whether anybody else was at work on the claim while she was at work there. General objections to all these

questions were sustained by the court. Respondents argue that defendants could not cross-examine as to these matters; that it was opening defendants' case, and that testimony to open their case could not be so introduced. But while respondents make this argument here, it does not appear from the record on what grounds they urged their objection below. No grounds are stated in support of any objection made by either party at any time in the trial below.

ENGLISH RULE.

The English rule on cross-examination is, that when a witness has been introduced and sworn and examined as to any material point in the case, the other party may cross-examine him as to the whole case, including any new matter of defense; but the extent to which he may be allowed to press the witness with leading questions will depend upon the circumstances of the case, the demeanor of the witness—his apparent bias and other things—and must, to a great extent, be left to the discretion of the judge. 2 Ph. Ev. 896-911. This rule is followed to a great extent in the United States. Parties may cross-examine as to all matters pertinent to the issue. *Webster v. Lee*, 5 Mass. 335, June term, 1809. Where a witness is sworn generally in a suit he can not be restricted on cross-examination to such points as the party calling him may choose to select. *Merrill v. Berkshire*, 11 Pick. 274.

Chief Justice Shaw of Massachusetts reviews the question thus: "But upon the question whether as a general rule the cross-examining party is prohibited from putting a leading question to a matter not inquired of by the party calling him on his examination in chief, there is adversity of opinion. It was held by Mr. Justice Washington that such questions could not be put. *Harrison v. Rowan*, 3 Wash. C. C. 580. This is a very respectable authority and entitled to great consideration. But in the case cited, the nature of the question and the circumstances under which it was put are not stated, and no argument was had, and no authority cited. The same view seems to have been taken by the supreme court of Pennsylvania. *Ellmaker v. Buckley*, 16 Serg. & R. 77. But we think the general practice has been otherwise, both in England and in this state, and is so laid down by the

compilers. 1 Stark. Ev., 4th Am. ed., 131; 1 Phil. Ev. 6th ed., 260. There is one authority directly in point where the objection was taken, and it was decided by Lord Kenyon, at *nisi prius*, that such leading question is admissible: *Dickinson v. Shee*, 4 Esp. Cas. 67; so in several recent cases it has been held, that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination. *Morgan v. Brydges*, 2 Stark. 314; *Rex v. Brooke*, Id. 472. On the whole, the court are of opinion that the weight of authority is in favor of the right to put leading questions under the circumstances stated, and that this is confirmed by practice and experience. It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple, and practical as possible, and that the distinctions should not be multiplied without good cause.

“It would be often difficult in long and complicated examinations to decide whether a question applies wholly to new matter, or to matter already examined into in chief.

“The general rule admitted on all hands is, that on a cross-examination leading questions may be put, and the court are of opinion that it would not be useful to ingraft upon it a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts; that it would often be difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary powers of the court where the circumstances are such as to require its interposition.” *Moody v. Rowell*, 17 Pick. 498; S. C., 28 Am. Dec. 317.

It should be borne in mind that the point involved in the case from 3 Wash. C. C., quoted by Chief Justice Shaw, was not whether the witness might or might not be cross-examined as to new matter, but whether on that cross-examination leading questions as to such new matter might be put. There is a general impression that the right to cross-examine implies the right to put leading questions, but the very point of *Harrison v. Rowan*, 3 Wash., is that the judge there was of the opinion that such is not always the case

that you may cross-examine and lead while you keep within the limits of plaintiff's case; but that when you strike new matter, though you may still cross-examine, you must not in that part of the cross-examination put leading questions: and though this seems a fine distinction, it may often be broad enough to secure valuable results.

But in Massachusetts and many other states they reject even this limitation on the English rule, and hold that leading questions may be put in cross-examination as to all matters in issue in a case. It may be urged that great hardship to a plaintiff might arise under so broad a rule, that he would never be safe in calling any witness, unless he knew, to an absolute certainty, how he would stand the fire of cross-examination all along the line of the case; but after an experience of fifty years under this rule in Massachusetts, the court say, in the October term, 1854: "Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party producing a witness. On the other hand, a different rule, by making it necessary for the court during the examination of a witness, constantly to determine what is or is not new matter, upon which the opposite party has a right to put leading questions, leads to confusion and delay in the progress of trials." *Beal v. Nichols*, 2 Gray, 264.

The English rule is followed in New York: *Jackson v. Varick*, 7 Cow. 238; *Varick v. Jackson*, 2 Wend. 167; S. C., 19 Am. Dec. 571; *Fulton Bank v. Staffo d*, 2 Wend. 483.

It prevails in Vermont: *Linsley v. Lovely*, 26 Vt. 123; in Ohio: *Legg v. Drake*, 1 Ohio St. 286; in Missouri: *Page v. Kankey*, 6 Mo. 433; *Brown v. Burrus*, 8 Id. 26; *St. Louis and Iron Mountain R. R. Co. v. Silver*, 56 Id. 265; also in Wisconsin: *Knapp v. Schneider*, 24 Wis. 70.

To what extent it prevails in other states we are unable to say, on account of the limited number of reports accessible to us here.

AMERICAN RULE.

Greenleaf says, vol. 1, sec. 445, that some of the states have adopted a contrary rule, which is called, by way of distinction, the American rule, but refers to only two cases, *Harrison v. Rowan*, 3 Wash. C. C. 580, and *Ellmaker v.*

Buckley, 16 Serg. & R. 77. But 3 Wash. C. C. is not a state report, and it does not say that the cross-examination shall not be had, but simply that leading questions shall not be put on such cross-examination as to new matter; and *Ellmaker v. Buckley* does not say it shall not be done, but simply that it may be refused as a matter in the discretion of the judge. Greenleaf, 1 Ev. 447, says that though the party may not cross-examine as to new matter before opening his case, he may recall the witness and cross-examine him after he has opened. In the same section, 447, he says that the rule is considered well settled, by the supreme court of the United States, that a party has no right to cross-examine except as to facts and circumstances connected with the matters stated in his direct examination, and quotes *Philadelphia & T. R. R. v. Stimpson*, 14 Pet. 448. We can not comprehend how this matter could have been considered by the supreme court as well settled. It certainly had not been settled by the supreme court itself. The point had never been before the court and was not before it in 14 Peters. The question before the court was as to the admissibility of certain evidence which was excluded below. The record showed that it was offered for the purpose of proving that the Baltimore Railroad Company, in making a compromise with a certain patentee and paying him an agreed sum to settle a claim he made upon them for an infringement of his patent, did not recognize that the patentee's claim was good, or that he had any right in the invention, but that the money was given to him simply to get rid of him. The supreme court said that on this showing the court below was right in excluding the evidence; that it was immaterial, or inconsequential, as they say; that the reasons which induced the Baltimore Railroad Company to pay money to the patentee have nothing to do with the patentee's right to his invention.

Then, after disposing of the question as presented by the record, they go a little further for the purpose of satisfying counsel, and say: "But it is now said that evidence was in fact offered for the purpose of rebutting or explaining certain statements made by one of defendant's witnesses in answer to cross-examination made by plaintiff's counsel." Then the court replies:

1. It does not seem natural from the record that the evi-

dence could have been offered simply to rebut those statements.

2. Defendant might have objected to the admission of those statements as not being legitimate under the cross-examination, they not being statements of facts and circumstances connected with the matters stated in his direct examination.

3. The question is then presented whether defendant, having omitted to object to improper evidence brought out on cross-examination, can thereby found a right to introduce testimony in chief to rebut or explain it.

This is the question to which all this introducing matter leads up, but they do not decide the question, and therefore it can not be said that having decided a question wherein the other proposition was taken as a necessary premise, they, by implication, decided that also. They dismiss the question with the remark, that if this improper cross-examination by the plaintiff had brought out something to his disadvantage, he would not have been allowed to rebut it, and therefore there is great difficulty in saying that if he could not do so defendant might; and then they waive the question altogether, and say that they place their ruling sustaining the exclusion of the evidence on other grounds, viz.: that it was not distinctly stated below that it was offered in rebuttal, and that it was seeking to introduce parol evidence as to a matter evidenced by a written instrument, without producing or accounting for the instrument.

Now is it not apparent from this that the second declaration on which it is claimed that so important a principle as the American rule on cross-examination is founded, is a mere *dictum* occurring in the statement of matters of inducement made for the purpose of bringing another question into notice, which other question was finally dismissed without adjudication? We apprehend that no court holds itself responsible, or desires to be held responsible, for every incidental remark made for the purpose of illustrating a question under consideration. We can not know what the court meant by saying that the principle involved in the second declaration was well settled. They could not have meant well settled in England, for such had never been the rule there. Nor in Massachusetts, Vermont, New York, Ohio,

Wisconsin, or Missouri. The case they had in hand was from Pennsylvania, and the rule in that state was, it is true, settled, as the supreme court says; but whether they meant that, or that it was settled in the United States circuit court for Pennsylvania, or what they meant, we can not tell. A *dictum* is defined by Bouvier to be "an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." It frequently happens that in assigning its opinion upon a question before it, the court discusses collateral questions, and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection and without previous argument at the bar, and as, moreover, they do not enter into the adjudication of the point before the court, they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. 1 Bouv. 476.

This dictum in 14 Peters may have contributed somewhat to the declaration in *Houghton v. Jones*, 1 Wall. 705, which still further contracts the rule. But even the rule as stated in 14 Peters is very broad; it covers an inquiry into all the facts and circumstances *connected* with the *matter* stated in the direct examination; but while it is broad, it is also uncertain, and uncertainty is almost the greatest defect a rule can have. Whatever may be urged against the English rule, it can not be charged with uncertainty. It possesses certainty even to my Lord Coke's celebrated third degree. There is little danger of trenching upon its limitations, for it is practically without any. We do not wonder that it is popular with judges, for it relieves them of all anxiety upon one of the most intricate and delicate branches of their duty. But it seems very hard that a party may be allowed to set up new matter in defense and draw the proof to support it out of the plaintiff's witnesses by cross-examination. Doubtless it is the apprehended hardship of this part of the rule which has tempted courts to depart from it; but whenever they have done so, and have failed to adopt some other definite rule, great trouble and difficulty have followed. The matter is one of the greatest possible moment. It affects, or may affect, the examination of every witness in the opening of every case; and it is a question which the

nisi prius judge must pass upon at once when presented. It is of the greatest importance to suitors, judges, juries, and counsel that some clear, well-settled rule be adopted, which may be applied with some reasonable celerity and certainty. In California they have cut loose from the old rule, and the consequence is, that such renowned jurists as Baldwin and Sanderson confess, that even on appeal, with full time for examination, they have difficulty in coming to a satisfactory conclusion as to what the judge below should have admitted and what he should have excluded. Under such a condition of things, no matter what the ruling of the judge below may be, there is always a fair chance for an appeal. It is a reproach to the law to admit that such an imputation is just. Rather than have such a state of things obtain here, we would be in favor of adopting the English rule out and out, for that at least has certainty to commend it. Judges in this country, who have worked under it, say it entails no hardship.

The first case in California where this question arose was in 1855. A majority of the court claimed to follow the case in 14 Peters and excluded the question; but Heydenfeldt, J., dissented, and stated that he thought the English rule ought to be adopted. *Landsberger v. Gorham*, 5 Cal. 451. In 14 Cal., four years later, Judge Baldwin speaks of difficulty under the construction adopted in California. He finally says that the question proposed was proper, but the only definite reason he gives for its propriety is that it did not concern new matter of defense, but was simply in denial of plaintiff's case. He comments on Greenleaf's rule, but does not touch the point whether defendant might not subsequently call the witness and cross-examine even on new matter. *Jackson v. Feather R. W. Co.*, 14 Cal. 24.

The next time we find the point appearing in California is in 1864, when it was held that "the witness not having testified in chief upon the subject of the alleged breach, defendant had, in strictness, no right to interrogate the witness upon that subject at that time." Shafter, J., in *Aitken v. Mendenhall*, 25 Cal. 213. The qualifying words "at that time" might seem to point to that portion of the rule in Greenleaf which says that defendant may cross-examine the witness by recalling him after his case has been opened.

We next find the question raised in *Wetherbee v. Dunn*, 32 Cal. 106, in 1867. Defendants offered testimony by cross-examining one of plaintiffs' witnesses, which, though relevant, did not tend to rebut anything which that witness had said in his direct examination. Held, that "it was properly excluded upon the objection of plaintiffs as to that mode of proof. So far as we can learn from the transcript the offer was not subsequently renewed." Sanderson, J. By the concluding sentence, it would seem that the court had also in mind the provision in *Greenleaf* as to cross-examination on recall. The question came up again in 33 Cal., in the same year as the last case. Judge Sanderson acknowledges having difficulty with the point. The plaintiff sued for an accounting of a partnership, concerning a mining company, in which there were shares of stock. Defendant asked one of plaintiff's witnesses on cross-examination whether the plaintiff had not assigned to him twenty-five shares of stock, which it was not contended was not the property of plaintiff to dispose of as he pleased. The object of the question was evidently to throw some discredit upon the witness, as showing him to be biased in favor of plaintiff. He says that the court erred in prohibiting the cross-examination, but the only reason he gives is that the witness was intimately associated with the plaintiff in matters directly connected with the facts involved in the action, and spoke to the main points in issue; that, under the circumstances, the defendant had a right to test his credibility by any mode of examination that was calculated to illustrate the attitude and relation of the witness to the parties and the subject-matter of the action. *Harper v. Lamping*, 33 Cal. 647.

But the question is, Under what general principle of law was it proper to exclude this question? How is a party to bring himself under the rule of this case? How is he to know what may reasonably be held to be within the rule in *Harper's* case? That the decision did not settle the point, we may infer from the fact that it was very soon after again presented to the court. We find it in *Thornton v. Hook*, 36 Cal. 223, in 1868. Plaintiff sued a sheriff for attaching and taking from him a team of horses. In presenting his case he proved by a witness that he had placed the horses in possession of witness to keep them for him on witness's farm, and

that while witness was so keeping them for him the sheriff attached and took them in a suit brought by creditors against one Bogart.

Defendant on cross-examination asked the witness if he knew how plaintiff came into possession of the horses, and if he knew whether, before the property was put into his possession by plaintiff, it had ever belonged to Bogart. Excluded. On appeal the court began by declaring: "It is not always easy to determine the precise point beyond which a cross-examination should not be allowed to proceed."

They say in effect that this question touched the destruction of plaintiff's case, but it also tended to help defendant's case; that it was pertinent to the matter pending, but that it also affected new matter. Then they say they will declare no rule in such a case, but leave it to the discretion of the judge below, and cite *Ellmaker v. Buckley*, and 7 Cushing, as authority for so doing. But the case in 7 Cushing, *Burke v. Miller*, 550, is a Massachusetts case, where the English rule prevails, and the right to a full cross-examination was admitted, the only objection made being that the judge ordered the defendant to wait till he had opened his case, there being no denial to him of his right, but merely a ruling on the order of testimony, it was held to be discretionary with the judge.

But the supreme court of Nevada meet this issue squarely on this point of double pertinency, and say that in such a case "the fact that circumstances called forth by legitimate cross-examination happen also to sustain a cross-action or counter-claim affords no reason why they should be excluded." *Ferguson v. Rutherford*, 7 Nev. 391. And in support of such proposition they cite 8 Mee. & W. 858. This seems to us the more reasonable doctrine, first, because there is certainty in it, and second, because it seems unfair that a question legitimate to bring out some truth which will help the defendant may be suppressed, because it must necessarily bring out other evidence, which in strictness ought to be offered at another time and possibly in another form.

Illinois is also vague and indefinite as to just what the new rule, called the American rule, means. In fact, no two authorities that we can find agree as to what the rule is.

The United States supreme court, in 14 Peters, does not follow Greenleaf; the 1st Wallace does not follow 14th Peters; and the state courts follow none of them, but seem to decide each case on its own inherent equities. The first glimmer of light, in the matter of precedent, which we can see upon the subject of how to proceed, if the English rule is departed from, is from Judge Baldwin, in the case of *Jackson v. Feather R. W. Co.*, in 14 Cal. He decides the matter first upon the general equities, and then adds that there is another reason why the evidence was proper, viz., that it did not relate to new matter of defense, but was a mere denial of plaintiff's case.

Judge Garber of Nevada, in *Ferguson v. Rutherford*, 7 Nev. 390, takes up the idea shadowed forth by Baldwin, and evolves from it a clear, definite rule, which everybody can understand, and which any one thoroughly versed in the effect of pleadings can apply, viz., that the one invariable test to determine whether the cross-examination can be permitted is, Does it concern new matter of defense or not? As we understand the purport of this decision, it means that whatever is in mere denial of plaintiff's case may be brought out on cross-examination, whether the witness directly testified concerning it or not; that any such matter is, for this purpose, a fact or circumstance, legitimately connected with the matter testified to; if the witness has testified to any material fact in behalf of plaintiff's case, he may be compelled to disclose on cross-examination all he knows about the plaintiff's case, and everything that will go towards denying and destroying the case set up by plaintiff; that so far as defendant has a right to cross-examine on such matter, he shall have the full benefit of cross-examination, viz., the right to make such examination leading, thorough, and exhaustive, and the fact that the evidence thus educed, while pertinent to the pending matter, will also help defendant's case is no ground for its exclusion. But he does not touch at all upon the other point in the rule as given by Greenleaf, 1 Ev. 447, that though a party may not before opening his case introduce evidence by way of cross-examination of the witnesses of the adverse party, yet he may do so after opening by recalling them for that purpose.

We have only one objection to the rule as stated by Judge

Garber, and that is the difficulty of applying it with certainty in the hurry of *nisi prius* trials. The test as to whether matter is or is not new matter of defense is, can it be given in evidence under a general denial, and very often it is not easy to say, at a moment's notice, whether the matter is new or not, in this sense. The rule would hardly forward business on the trial. There would be the same objection by counsel as to admissibility, the same consumption of time in argument, and the same hesitation on the part of the court to decide; but there is this advantage, after the trial is over all parties know just what is necessary to determine whether an appeal will lie or not; they know where the line is drawn; they can look for it, and when they find it they know that they have struck "wall rock," and that it is useless to go further. This is a great deal better than trusting to some other man's idea of the general equities of the case. Still, it is a very poor substitute for the plain, simple English rule, which avoids all possibility of dispute, saves all contention at the trial, dispatches the business at once, and yet, according to the testimony of our oldest and busiest states, hurts nobody. Nevertheless, the supreme court of the United States has discarded the English rule, and has furnished some suggestions for a new rule, which different states have accepted as a basis on which to build up what is called, by way of distinction, the American rule, though it has hardly received an adoption sufficiently general to warrant such a title.

These suggestions have been adopted in California and Nevada, and our intimate relations with these states leads us to believe that, on the whole, it will be more satisfactory to all parties interested to have our practice in harmony with theirs. As the matter of determining rules on these matters is almost universally left to the courts, and as it is exceedingly desirable to have something definite on the subject, we shall adopt the following rules, believing them to be clearly in accordance with the doctrine held in Nevada, and substantially in accordance with the practice in California:

1. When an adverse witness has testified to any point material to the party calling him, he may then and there be

fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given under a general denial.

2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim affords no reason why it should be excluded.

3. The party entitled to cross-examine may waive his rights to do so at the time, and recall the witness and cross-examine him after he opens his case.

4. The court, in its discretion, may forbid the cross-examining party putting leading questions when the objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is good.

Under this view the assignments of errors from one to five inclusive are good. The questions were improperly excluded. They merely tended to show that the title to the premises was really in the defendants, and not in the plaintiffs. In ejectment it is not new matter to set up defendant's title. *Marshall v. Shafter*, 32 Cal. 176. It was error generally to exclude the questions, because no valid grounds of objection were stated. A general objection is bad.

Errors 6, 7, 8.—The court erred in rejecting the evidence offered by defendants to prove that plaintiffs knew that the work on the claim had been done by Linn, and that they had examined the records and knew of defendants' title to the premises in question. 1. Because no specific objection was made to the introduction of this evidence. 2. It was evidence tending to show title and possession in defendants, and was therefore not new matter, as was ruled in 32 Cal. 176.

Parties must distinguish between new matter and new evidence, between new matter of defense and new facts and circumstances connected with plaintiff's case. A new fact properly brought out is in one sense a new matter, but it is some matter connected with plaintiff's case which goes to break down the case he is attempting to make, and so long as

it is not exclusively new matter of defense which could not have been offered under a general denial, it is admissible. We do not mean that this evidence was proper because it might show that plaintiffs had notice of defendants' title; but whether proper for that purpose or not, it was proper for defendants to show by these witnesses, as well as by any others, that they had located and recorded the claim and had done work upon it. The questions were directed to facts going to prove title in defendants, and such proof, if made, would have been in direct denial of plaintiffs' allegation that the title was in them, and therefore was not new matter of defense.

Error 11.—The court erred in rejecting the question, "What authority, if any, did you ever give Mr. French to make locations of mining claims for you in this territory prior to location of the Tiger mine," because no specific objection was made to the question; and herein becomes painfully apparent the consequence of bringing a question before us in this form, because we can not strike at the heart of the matter upon such an objection. The object of an appeal is to settle something, so that, when the case goes back, the parties can know where they stand as to the questions raised on appeal. What can we settle on this question? Are we to go into an examination as to whether this question is leading or not, or whether it was a proper question to ask the witness at the time it was propounded, or whether it was immaterial or irrelevant at any time? We can not guess as to which of these points counsel desire a ruling; but as no authority is necessary to enable one to locate a mining claim for another, we think that the question might have been excluded as immaterial, if objection had been made on that ground. But though immaterial so far as authority to locate being necessary was concerned, it might have been material for some other purpose, and therefore, if objected to as immaterial, the particular reasons why it was claimed to be immaterial should be stated.

Error 12.—The court erred in excluding evidence of the contents of the letter from Linn to French, which accompanied the deed and power of attorney to French, because no specific objection was made to the introduction of such evidence. This evidence stands in one respect on much the

same ground as that objected to in the last exception. We can not tell what objection plaintiffs had to it; whether that it was immaterial, or that sufficient foundation had not been laid for its introduction. We think that the foundation was sufficiently laid. We must distinguish in these matters as to the character, occupation, and business habits of the person claiming to have lost a paper, and as to the importance of the paper itself.

If the witness were shown to be a lawyer or business man, with an established office, or place to keep his papers, and who claimed to be unable to produce an important document received by him in the course of business, we would hold him to very full proof of loss and search; but if it were an unimportant document, one of trifling value to anybody, we could not hold him to such full proof. But the witness in this case was shown to be a wandering miner, a prospector who moved over the whole mineral region west of the Rocky mountains, flitting hither and thither at a moment's notice, according as the mining excitement raged in one part or another. Naturally, we would not expect such a man to carry many papers about with him. He testified that it was his custom to burn all letters as soon as answered. He said that he could not find this letter, and supposed that he had burned it, as was his custom. It is true that the proofs of search were not very full, and would not have been sufficient in the case of an ordinary business man with an established place of business, or residence, as to a document received by him in the ordinary course of business, but in this case we think that it was sufficient. We do not see, though, how it was material, but no objection was made on that ground.

Error 13.—The court erred in rejecting the question, "For what purposes did you request Linn to send you a deed of premises in controversy, or power of attorney?" because no specific objection was offered to such evidence.

Errors 14-26.—The court erred in rejecting the evidence offered, because no specific objection was urged against its introduction. So far as the evidence was offered to rebut the presumption of fraud in using Linn's name as a locator, with the expectation that he would convey his title to French, or Moreland, the parties who made the location for Linn, it

might have been successfully objected to as immaterial, because no presumption of fraud arises from such a fact. It is no fraud on anybody for one man to locate another in a mine, and receive back from such person a deed to the property, having made no misrepresentations to such person as to such transfer. Nobody is injured by such a proceeding. The law and customs of miners permit persons to make locations for persons not present. When so made, all the title anybody can acquire by location vests in the persons so located. They can not be divested of it except by their own voluntary act, or by forfeiture in not complying with the rules and regulations of the district. The title thus acquired is theirs to dispose of as they please. They may bargain, sell, transfer, or give it to whomsoever they like. By having once been located in the claim, their right to acquire any further interest in the discovery by location is exhausted. The fact of their non-residence is immaterial, unless the contrary is expressly declared in the rules and regulations of the district. Whether the miners would have power to disqualify non-residents from being located is, of course, not passed upon here; but when there is no attempt at such disqualification, non-residents stand in the same position as those in the district. They must contribute to the development of the district by working their claims, or paying the fees, the same as those present, and it has been the policy of miners to encourage such locations rather than look upon them with disfavor. It causes their mining district to be known abroad, and furnishes additional means for its development.

Errors 27, 28, 29.—The court erred in rejecting the evidence as to the declarations of plaintiff's grantor relative to the grounds on which she based her title, viz., that she expected to hold the premises because Linn was a non-resident, and that therefore his location was not good because no specific objection was urged against such evidence. Evidence on this point would have been material and admissible if it formed a part of the *res gestæ*. The witness was the immediate grantor of the plaintiffs; declarations of a grantor as to the nature of the title he asserts, when they go to limit his title, are admissible, not only against himself, but as against parties claiming under him. *Stanley*

v. *Green*, 12 Cal. 148. The reason of this rule is that when a person admits anything against his own interest, he can not claim that such admission is unworthy of belief. He can not object to it as insufficient evidence against himself, and his grantees take his interest in the premises *cum onere*. If this were not so, a party could always avoid his own admissions by simply deeding to some one else. But these admissions must be contemporaneous with the fact to which they relate. The material fact in the case of this exception is not the mere act of Mary Sawyer placing the notice on the mine, but the grounds on which she based her title. As long as she claims title to the premises she is supposed to be interested in maintaining that title. Any admissions made by her as to her title during the time she claimed it, which would go to limit, impair, or modify that title, must be admitted as against her and her grantees. But the moment she has parted with the title, she becomes a stranger to the contest, and her remarks as to the title, made after she has ceased to claim under it, are of no consequence. She may be interested, then, in decrying the title. The evidence sought to be introduced went to show that she knew that defendants had already located the premises, and the reason assigned by her why she thought defendants' title not good was the simple fact of non-residence. Such evidence might often be of great importance. Defendant has a right to show title under a general denial. The record of this title may be lost. He may have no witness to prove that he was located. He may have been, as in this case, a non-resident at the time he was located. The party who located him may be dead or inaccessible, and then an admission of a would-be ejector that defendant was in fact located, but that there was a question whether he was entitled to hold or not, might be decisive of the whole case. The jury might find that, the location being admitted, he was entitled to hold, notwithstanding his non-residence.

Errors 30, 31.—These assignments of errors are practically the same as 7 and 8. In 7 and 8, Davis, one of the plaintiffs, testifying in the opening in his own behalf, was asked by defendants in cross-examination if he did not know that defendants had worked and recorded their claim. Objected to and excluded. Subsequently de-

fendants, after opening their case, called Davis as a witness, and asked him the same questions. Objected to by plaintiffs. Objection sustained. Defendants except, and assign errors 30 and 31. It was error to exclude the testimony: first, because no specific objection was made thereto; and second, for the reasons given in considering points 6, 7, and 8.

Errors 32, 33.—The court erred in excluding the evidence of Collier and Henry as to mining customs, because no specific objection was made thereto. The question asked of Collier was open to objection, as being too general for the foundation laid. He showed a knowledge of the customs of Yavapai county alone, and was asked as to general customs without limitation to place; but to raise the point, the special ground of objection should have been stated. The effect of such an objection, we may naturally suppose, would have been to limit the question to that county, and then there would have probably been no appeal on this point.

Question 33 to Henry seems to us free from objection as to lack of foundation, but in any event, as no particular objection was urged, and the question seems proper, it was error to exclude it.

Errors 34, 35.—Plaintiffs introduced proof of an agreement between Thorne and Cassidy, on the one part, and Moreland, an owner in the original Tiger claim, on the other, whereby Moreland was to locate for them four hundred feet next north of the premises in controversy, on condition that they would deed back to him one half of the ground, and that the agreement was fully carried out. Defendants objected, were overruled, and assign therefor errors 34 and 35. The objections were properly overruled, no specific grounds of objection having been stated, and we can not say that the testimony might not have been admissible for some purpose.

Counsel for plaintiffs urge here that the testimony was relevant and of weight, as relating to an attending circumstance going to show a fraudulent intent of the original locators of the Tiger in trying to hold, by this agreement, more ground on the claim than they were entitled to retain by location; and that such a circumstance, if proved as

to the Thorne and Cassidy claim, would tend to raise a presumption, taken in connection with other circumstances, that the same thing was true as to the Linn location. We will notice the point in considering assignment No. 44.

INSTRUCTIONS.

Error 36.—The refusal of the court to give the concluding clause of defendants' second instruction was in effect a refusal to charge, that, a claim being located according to local rules and customs, a failure to comply with such rules as to making and holding the claim would not of itself work a forfeiture, unless such failure was of itself ordained by such rules and customs to be a forfeiture. This was error. The general rule is that a statute without a penalty is mere *brutum fulmen*. The miners are recognized as law-makers in the matter of their rules and customs. When they prescribe a duty and affix no penalty for non-compliance, how are we to know what penalty they intended? For us to fix the penalty would be to make laws for them, which we have no right to do. The province of the courts in this matter is merely to receive the evidence, and from it to declare what laws, or rules, the miners have in fact adopted. Courts do not presume in favor of forfeiture; but on the contrary, when parties claim a forfeiture, under the mining laws, these laws, instead of being liberally construed to establish the forfeiture, will be strictly construed as against it. *Coleman v. Clements*, 23 Cal. 248. The failure of a party to comply with a mining rule or regulation can not work a forfeiture unless the rule itself so provides. *Bell v. Bed Rock T. & M. Co.*, 36 Cal. 219; *McGarrity v. Byington*, 12 Id. 426; *English v. Johnson*, 17 Id. 118.

Error 37.—Defendants asked the court to instruct, that "if the defendants were in the possession and occupancy of the claim in controversy at the time plaintiffs' grantor attempted to make her location, no right was acquired by such location." The court refused to give this instruction, but gave in its stead another and very different one, by inserting the words "located and lawfully" before the words "in the possession." This was calculated to seriously mislead the jury. It was the same as to say to them that possession and occupancy were not sufficient unless accompanied by a formal

location, and that in addition to location the possession and occupancy must be lawful. This, so far as it related to possession before May 10, 1872, was error, and the possession claimed in this case was before that time. Before that time, possession and occupancy, so long as they continued, were sufficient to hold a mining claim against a would-be subsequent locator. The main object of recording a claim is to give parties the opportunity of ascertaining, by visiting the records, what ground is claimed in the district. The only object of putting a notice on the claim is that it shall speak for the owner in his absence, and to give notice to parties coming on the premises that some one has claimed them; but if the party is there himself, in possession and occupancy of the claim, by himself or his agent, he gives the parties fully as much notice as they could derive from inspecting a slip of paper. If it be suggested that a written notice speaks with more certainty, the answer is, that it is doubtful if that be so. A notice never does more in regard to boundaries than to describe the length of the claim. A party claiming to hold by mere actual possession must mark his boundaries by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are, and he must occupy within them, or do work which is intended to affect the premises; and he is bound by any declaration he may make as to what his possession covers, in this, that he can not hold more than he claims. If he claims more than the law allows him, a stranger may locate the surplus just as he could in case a written notice claimed an excess. Of course, if the miners had legislated upon the subject, and in their local assemblies, known as miners' meetings, had adopted a law that mere possession should not hold against a party regularly locating under the laws, then such possession would not prevail as against such subsequent location; but in the absence of such law—and its absence is presumed until the contrary is shown—actual possession is good so long as it lasts.

Before 1866, the courts, of their own motion, adopted the rules, regulations, and customs of miners as a standard by which to determine issues arising between such miners. But from July 26, 1866, to May 10, 1872, which covers the possession and occupancy involved in this case, citizens,

and those who had declared their intention to become such, were, by act of congress, permitted to explore and occupy mineral lands of the public domain, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. Here was as absolute a grant of legislative power given to the miners themselves as congress ever gave to the legislature of any territory—or rather much larger, for there was no local veto that could nullify their acts. The customs, rules, or regulations of miners were thus given, with the limits named, the full force of legislative enactments, as binding upon the courts of this territory as any law of the legislature, and subject to the very same rules of construction. It gave in this country probably the first example of the pure democracies of ancient times as seen in the Grecian states, when the citizens made their laws, not through the medium of representatives, but by assembling in person and directly declaring their will in the matter. These laws come directly from the source of all political power, the people themselves duly authorized to act in this manner, and this is why they have just as much solemnity and binding force as though they had been enacted by representatives of the people instead of the people themselves.

The questions as to rules or customs, thus adopted, are the same as with any other legislative acts presented. Did the act, or rule, become a law? Was it in force at the time claimed? What is the meaning of the words used? What rule do they establish? How does that law or rule affect the case? Up to May 10, 1872, there was generally no limit to the power of the local legislatures known as miners' meetings, except the general principles of law.

During this time, then, actual possession was good, so far as it did not claim more than the law allowed, it not being shown that a failure to comply with the rules by posting a notice, recording, working, etc., was of itself declared to work a forfeiture. Since May 10, 1872, there are some restrictions upon the powers of miners to legislate.

The United States act of May 10, 1872, prescribes some conditions as being necessary to sustain a possessory title, and expressly declares that a failure to comply with those

conditions will of itself work a forfeiture, and leave the premises open to relocation. But those provisions do not apply to this case as to the points now in hand. It was also error to insert the word "lawfully" as qualifying the possession and occupancy of the premises in controversy, without explaining what force or meaning it was intended the term should have. *People v. Byrnes*, 30 Cal. 206. Legal terms must not be used without explanation. There is a great necessity for this rule. The law is full of expressions familiar as household words to a lawyer, but no more intelligible than so much Greek would be to the average juror. Not to go back to the old books at all, but to take the language of judges in our own country, in comparatively modern times, it may be, and doubtless is, perfectly correct to say that the devisee of a remainder in fee, after death of tenant for life, formerly had remedy by formedon in remainder, or on entry after death of donee for life, by writ of entry declaring on his seisin: *Wells v. Prince*, 4 Mass. 66; that in double pleading to writ of entry sur disseisin, first plea, nul disseisin, second in bar, that plaintiff was never seised, second is bad: *Martin v. Woods*, 6 Id. 6; that a plea of non-tenure in formedon without remainder is good: *Prout v. Libby*, 14 Id. 151; that in a writ of right a plea of seisin to save an easement is bad, for confessing easement alone confesses non-seisin: *Miller v. Miller*, 4 Pick. 244; that darrein seisin is good against a writ of right: 3 Wheat. 175; that generally a descent cast tolls the entry, but the equity of the *jus postliminii* sometimes saves the right to an infant heir: 10 Johns. 357; that in pleading a common recovery as sued to the use of the tenant in tail, who was to the *præcipe*, it is not necessary to show that the indenture to lead the uses was executed by him: *Dow v. Warren*, 6 Mass. 328; that in California, defendant in ejectment must set up subsequently acquired title as in the plea puis darrein continuance: *Hardy v. Johnson*, 1 Wall. 371; or that under the plea of non-tenure with disclaimer and issue to the country, with or without finding for the tenant, plaintiff is not entitled to possession: *Porter v. Rummary*, 10 Mass. 64; but if it be a plea of nul disseisin only, in a writ of entry by a trustee against a *cestui que trust*, plaintiff may recover: *Needham v. Ide*, 5 Pick. 510; but it would be a hardship to suitors to instruct a jury in

such language and then say to them, "Gentlemen, this is the law of the case; you are bound to follow it, and render your verdict accordingly."

Why should not this language be used? It is English by adoption and use; it is clear, forcible, exact, and terse beyond any colloquial words which can be found; but the trouble is, the jury might not understand it. It was necessary, therefore, to adopt the rule that legal expressions should not be used without explanation in such cases. The term "lawful" may seem simple enough for any comprehension, but day after day is often spent in the sole effort to determine whether a certain act was lawful or not. It would be manifold error to instruct, without further explanation, "if you believe that the defendant lawfully killed the deceased, you will acquit," for that is to make the jury the judges of the law. And so of the use of any legal term; if it is reasonable to think it may have misled the jury, the use of it without explanation will be error.

Error 38.—Defendants in their sixth instruction asked the court to charge, "that the subsequent ratification by Linn of the location by him gave the location the same effect as if made by himself." Given with the qualification added, "unless a valid location by some other person had in the interval between the location of French and the ratification by Linn been made and perfected." Thus saying, in effect, that the title in an absent locator does not become perfect until he has knowledge of it and ratifies it. This was error. When a location is made for an absent locator, whether with or without authority, or with or without his knowledge, whatever rights are given to him by such location vest in him at once, and even the person locating such absentee, without authority, can not take down the name of such absentee and insert another, even if he do it before the absent locator has knowledge of the fact that he has been located. *Morton v. Solambo C. M. Co.*, 26 Cal. 527.

Error 39.—The court refused to give the words in defendants' seventh instruction, "and a location made by one person for and in the name of another vests a right in the one for whom the location is made, which can only be divested by his own acts or omissions, or by operation of law." This was error. *Morton v. Solambo C. M. Co.*, 26 Cal. 527. The

court added the words, "but some authority, express or implied, must exist, or the agency must be ratified before other valid claims intervene." This was error. It tended to mislead the jury. As a matter of law, there is implied authority in the very act of making the location, but it tended to impress upon the jury that some other authority was necessary. None other is required. *Morton v. Solambo C. M. Co.*, 26 Cal. 527. Counsel for respondents urge that a mining claim is an interest in lands within the meaning of the statute of frauds, and that it can not be created without authority in writing. The point is not fairly before us, and we will dismiss it with the remark that the object of the statute is to guard the owner of an estate in lands against any new estate in the same property being created for another out of the estate of the owner, except by the operation of law, or by his written consent.

This writing is to be signed by the party *creating* the estate, or by some one having written authority to do so. The party who locates a mine *obtains* an estate therein by such an act, but it is not he who creates that estate. Whatever estate he obtains, he derives from some source. There is a proprietor of the land above him. This proprietor says to the locator, Do thus and so, and you may have a certain estate in the mine. The locator performs the act and obtains the estate, but it is the proprietor who creates the estate in him. If another person places a notice on the claim, that other person does not thereby create an estate for anybody. He has no estate in the premises out of which he *can create* an estate for another. He is merely performing the acts which are a condition precedent to the creation of an estate in the premises by the real proprietor. It is only after the estate comes into being in the locator that the statute of frauds as to his acts in creating estates in the premises for others applies. The court, in refusing plaintiffs' instruction on this point, ruled correctly.

Error 40.—The eighth instruction of defendants was refused, and was as follows: "The law makes the discoverer of a mine the agent for those for whom he chooses to act, and his act becomes their act, regardless of the fact whether the party for whose benefit the location is made has any knowledge of it, or not. In such cases, however, the agent

making such location has no power afterwards to make any change in the same, so as to affect injuriously the rights of the party for whose benefit the location was made. A failure to comply with the local rules or customs of the district will not work a forfeiture, unless such failure is declared by such rules or customs to be a forfeiture."

This instruction is obnoxious to criticism in this, that it contains two distinct legal propositions relating to entirely different questions. Still, it stated the law correctly as to all cases arising before May 10, 1872, of which this was one, and it was error to refuse it. The territorial law, declaring forfeitures for non-compliance with its requirements, was repealed in 1866, and no other law declaring forfeitures was enacted until the United States act of May 10, 1872. The latter portion of the instruction as to forfeiture would require modification, but it was correct as to cases arising between 1866 and 1872.

Error 41.—Plaintiffs asked for the following instruction: "3. If you believe from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, you will find for plaintiffs, unless the jury believe from the evidence that defendants had a better right to the possession than that of plaintiffs;" which was given.

This instruction raises the question as to what plaintiff must show in order to entitle him to recover in ejectment. The answer is, He must show a right of possession. Formerly he was obliged to show, not only a right of possession, but also a valid, legal, subsisting title in himself at the commencement of the action. Showing even an equitable title was not sufficient: *Adam's Eject.* 32; Lord Mansfield, in *Atkyns v. Horde*, 1 Burr. 119. It was formerly the rule, without any qualification whatever, that any defendant, no matter under what circumstances he entered, might defeat the action by simply showing an outstanding title in some one else than the plaintiff, even though the defendant did not in any way connect himself with that title. This was the logical sequence of the rule that plaintiff must recover on the strength of his own title: 3 Com. Dig. 553; that, therefore, it mattered not in what way defendant showed that plaintiff was not within the rule; if he showed it, that was sufficient

to defeat the action. This doctrine was held in our United States supreme court as late as in *Love v. Simm's Lessee*, 9 Wheat. 515.

The learned judge who delivered the opinion in that case felt that there might be some force in the objection; that it was extending too much consideration to tort-feasors, mere naked trespassers, to give them the benefit of such a rule; but he remarked that such cases must be of rare occurrence, and that it was time enough to consider them when they arose. The judge evidently never lived in a mining country; that is, one where the "jewels of sovereignty," the precious metals, were the subject of contention; where it is not uncommon for a man to retire at night from premises of which he has had peaceable possession for years, and on his return next morning find strangers encamped upon his grounds, with barricade erected, shot-guns and six-shooters displayed with reckless prodigality, and a wild-mannered captain accosting him with the bland salutation, "Don't you think it would be healthier for you to keep away from here, my friend? We don't want to hurt you, you know; but we have been requested to retain possession of these premises." The gallant captain himself would admit that we had outdone him in courtesy if we were to give him the benefit of the rules as applied to *bona fide* innocent holders, claiming under color of title.

The first case of tort-feasor presented in the supreme court, subsequently, was from the Texas border country in *Christy v. Scott*, 14 How. 292, and the court then modified the rule so as to declare that a mere intruder, entering without any claim of title upon the peaceable possession of another, and ejecting him therefrom, can not then question the title of the party dispossessed, nor can he undertake to show that the real title is in somebody else. He has made a contest simply on possession, and if plaintiff shows a prior peaceable *bona fide* possession, and the defendant shows nothing but his mere intrusion, the plaintiff shall have judgment. But if the defendant entered under color of title, under a claim of right, he is not under the ban, and he may rebut the plaintiff's claim of title, or right of possession, by showing that it is in himself, or in another, subject, however, to one additional limitation, which it was found necessary to adopt in California.

In California, and other mining countries on the Pacific slope, the general government refused for a long time to grant any title to the mineral lands, but tacitly acknowledged a license to work the mines, raising a kind of tenancy at will in the first occupier. The courts found it necessary to declare that this *bona fide* prior occupation should be sufficient to maintain ejectment against any one not connecting himself with the paramount title; that the possessory title sufficient to maintain the action vested in the first possessor and flowed from him. The defendant was not prevented from showing that the possessory title was outstanding in another, but merely showing that the paramount title in fee was in the government was not sufficient. This rule is stated in *Coryell v. Cain*, 16 Cal. 573, and the reasons most lucidly given by Mr. Justice Field, who did so much in California to add to the glory of the common law, by showing how admirably the animating principles of its apparently rigid rules could be applied to the newest and strangest condition of society.

There are two kinds of possessory rights recognized in this territory; one based on the act of November 9, 1864, Compiled Laws, p. 536, the other resting on mere prior occupation. To maintain a right under the first, plaintiff must show a compliance with the requirements of the statute; to succeed under the second, he must show prior possession, without alienation or abandonment, down to the time of the entry complained of. The action of ejectment is a possessory action, and possession always raises some presumption of right. Plaintiff begins in ejectment, as to this matter, by averring that he is entitled to the possession, that the defendant has the possession; then he undertakes to overcome the presumption flowing from defendant's acknowledged possession, by showing that defendant obtained that possession wrongfully by entering upon the possession of plaintiff. If the matter stop here, plaintiff must recover; but if defendant show in reply, as here, that plaintiff obtained his possession by entering on the possession of defendant, presumption is shifted again in favor of defendant; then, unless plaintiff can go higher in the history of possession, and bring the presumption back in his favor, he does not, through proof of possession alone, put the defend-

ant upon his defense at all, and if this be the end of the showing made by the plaintiff, he must fail. But plaintiffs did not stop here in this case; they showed color of title; to wit, a notice of location of the premises. Defendants replied by showing an earlier notice of location for the same ground.

Here, then, was a case where plaintiffs, according to the evidence, had failed so far as a naked possession was concerned, for defendants showed a prior possession. The question then stood as between the parties as to the effect of plaintiffs' notice of location. Instructions should be in harmony with the proof in the case. It was, therefore, error to instruct the jury, "that if they believed from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, they will find for plaintiffs, unless they believe from the evidence that defendants had a better right to possession than that of plaintiffs." This instruction, we may reasonably infer, led the jury to believe that the mere fact of possession by plaintiffs at the time of the ouster gave them, under the evidence in the case, a *prima facie* right to recover. This was not the law, because the presumption flowing from that possession by plaintiffs had been met and overcome by defendants when they showed an earlier and continuing possession under an earlier location of the same premises. The qualifying clause as to their belief of defendants' better right did not save the instruction, because the jury, we may reasonably believe, were misled as to the condition of defendants on that issue, and as to what *onus* of proof was on them. Any charges given to the jury as to the effect of possession in this matter should have informed them that if they believed defendants had shown a prior and continuing possession, all presumptions, so far as mere possession was concerned, were in favor of defendants. As this case goes back for a new trial, and as the conflict will probably be as to the effect of the two notices, and as the case has already been here twice, it may be well for us to remark, that any charge given concerning the notices should be given with careful regard to the evidence adduced respecting them, and that the jury be instructed as to what the effect will be in law upon the rights claimed under the notices, according as they believe any particular set of facts

has been proven, and not leave it to them to say generally which they consider gives the better title.

Error 42.—The court gave the following instructions at the request of the plaintiffs: "If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim, without further consideration, Moreland and French having already located two hundred feet each on the same lode, and that Linn ratified the act of location for the purpose of making such conveyance, such location was void, as a fraud and evasion of the law." There is nothing in the record tending to show that French ordered the location of the claim to be made for Linn for the purpose of having the whole or any part of it deeded back to him or Moreland, without further consideration, nor is there anything tending to show that Linn ratified the location for the purpose of making any such conveyance; on the contrary, the evidence is directly the other way so far as it raises any presumption on this point. The evidence is, that as soon as the location was made, French advised Linn that it was of great value; that the vein was twelve feet wide, assayed one thousand three hundred and fifty dollars per ton silver, and that he thought that the location made for him (Linn) would be good for ten thousand dollars in less than a year. Fifteen days afterward, he again wrote him, speaking more enthusiastically than before of the value of the claim, saying that it was from twelve to twenty feet wide, averaging one thousand dollars per ton, smelting process, assaying two thousand dollars per ton, to have no fears, that their claim would be worth one hundred thousand dollars in less than a year; that he would write for Linn to come as soon as he thought it necessary, but in the mean time he wanted the deed without delay, in order to have no doubt about being able to protect their claim. Linn came on from Nevada some four or five months after, and then French deeded back to him half the ground. Linn testified that it was at his, Linn's, request that French kept the other half of the ground in his, French's, name as security for Linn's indebtedness to him. This is, so far as we can see, all the evidence as to the motive French had in getting the

deed for this ground from Linn. Does it tend in any way to raise a presumption that possibly French was trying to commit a fraud on some one, by trying to get a deed of this ground to himself without consideration? We can not find anything in the record to show that he underestimated the value of the location in his representations to Linn. In the first letter of advice, which it is shown was received by Linn before he made the deed, he gave his opinion that Linn's claim was worth, or would be in the course of a year, ten thousand dollars. Fifteen days later he wrote a letter, which it was shown was received by Linn before he sent the deed, in which he says, "our claim will be worth one hundred thousand dollars in less than a year." We do not know exactly what he meant by that, but if we are to consider the evidence for the purpose of saying what inference might be drawn from it, we would infer that, as each one of them had a claim of two hundred feet on the vein, the meaning was that their claims were by him considered to be worth fifty thousand dollars apiece.

We do not think that this evidence raised any question in the case as to French's honesty of intention in the matter of making the location for Linn, or that he expected to get possession of the premises from Linn without consideration. We are not speaking of the weight of evidence. If there had been any conflicting evidence on this point, a question might have been raised for the jury to determine whether French had made these representations or not, whether he had in fact deceived Linn as to the value of the premises, and whether the deed Linn made to him was an absolute conveyance instead of a trust, and whether that was fraud. Even in such case, if they had found fraud, it would only have been a fraud of French upon Linn; would have left the whole title in Linn, and so would not have helped the plaintiffs. But there was no evidence raising such a question in the case, and therefore the instruction had no relevancy to any question involved in the issue. It is never error for a judge to refuse an instruction under such circumstances. Whether it is error to give such an instruction, depends upon whether it is calculated to mislead the jury or not. If it appear at all probable that a superfluous instruction might have misled the jury so as to materially affect their verdict,

then it is error to give it; and when error is shown, injury is presumed, unless the contrary plainly appears. This instruction might have misled the jury. It invited them to consider and pass upon a question of fraud not raised by the evidence. Such consideration might have prejudiced the defendants, and therefore the giving of the instruction was error.

Error 43.—The following was given as an instruction by the court: "If the location of the mining claim in question was made in the name of Linn, by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim, without further consideration, Moreland and French having already located two hundred feet each on the same lode, the location was absolutely void, as made in fraud and evasion of law."

1. There was nothing in the evidence on which to raise any presumption that French or Moreland had located the premises with such expectations, and the instruction was therefore irrelevant. It was likely to mislead the jury, to the prejudice of the defendants, because it said to them, in effect, that there was such a question involved, which they should pass upon, and therefore the giving of it was error.

2. Even if the evidence had left it an open question whether French or Moreland had an expectation of getting the ground deeded to them without consideration, that is, getting a deed of gift to the premises, and had made the location for that purpose, it was error to instruct that such location would therefore be absolutely void. The location put the title in Linn, to dispose of as he pleased. Even if the parties locating him had expected that he would deed back to them for nothing, and made the location because of that hope and belief, Linn might have been ignorant of such intention and expectation, and might have declined to gratify it. His title depended upon the fact of location, not on the intention the parties locating him might have had in their own minds at the time. A person locating for an absentee, in the hope that the latter will give away the right thus secured for him, takes the chances as to whether he will give it away or not, and as to whom he will give it, if he gives it at all. In case a located person knew in advance that the object of using

his name was to enable the person using it to hold more feet on the lead than he could acquire by location under the laws, and consented to such use of his name for that purpose, the question as to whether such an arrangement between the parties would be a fraud sufficient to vitiate the location is not before us.

The question as to the propriety of the second instruction of the court is practically considered in errors 41, 44, and 45.

The forty-fourth and forty-fifth assignments of error are, that the court erred in not granting a new trial, because, it is claimed, the evidence is insufficient to justify the verdict, and that the verdict is contrary to law. Of course the general rule is well established, that, no matter how much evidence the transcript discloses against the verdict rendered, if it shows sufficient evidence in support of the verdict to raise a substantial conflict with the evidence on the other side, this court will not interfere. For when there is a substantial conflict of evidence, it is the province of the jury to weigh the evidence and decide which side is entitled to prevail.

The transcript in this case embodies all the evidence that was given, and sets it all out with wearisome particularity in the exact words as given by the witnesses—a most objectionable and reprehensible manner of making up a statement. Considering the roundabout way in which most witnesses generally tell their story, and the mass of trifling and irrelevant matter they interweave with their statements, a lawyer, when he comes to present to the supreme court a statement of what has been proven on the trial, should not follow the words of the witness, but should state succinctly what evidence was given which is material on appeal. There may be nothing in the testimony of the witness affecting the appeal, and if so, his narrations should not be thrust upon us to consume our time and exhaust our patience. In this case, about two hundred folios of oral testimony have been sent up, when the whole statement could have been much more clearly presented in the compass of thirty or forty folios. But counsel very considerably caused the transcript to be printed, though not obliged to do so. Had they not done so, this case could not have been examined in time for the approaching term of the court below. Now,

as to whether there is a substantial conflict of evidence in this transcript: all presumptions as to possession were overcome as to plaintiffs, because defendants showed a prior and continuing possession down to the beginning of plaintiffs' possession. Plaintiffs were then put upon their right of possession. They introduced paper title—a notice of location. Defendants proved a prior location.

The whole issue turned, then, on the question as to whether plaintiffs' notice was good. Plaintiffs made but two objections to defendants' notice, charging: 1. That it was fraudulent; that, if not fraudulent, it was void, having been made without authority, and therefore void *ab initio*. 2. There being no other issue before the jury, in finding for plaintiffs they declared that defendants' location was either void for fraud or void from want of authority to locate.

We have read the transcript over repeatedly and carefully, and we can not find any evidence at all which raises a question of fraud, or which tends to raise a presumption of fraud, even granting that the evidence proved the facts which plaintiffs claimed constituted the fraud.

Granting that the agreement between Moreland, individually, and Thorne and Cassidy, as to the latter deeding back half of the ground in consideration of a location being made for them was fraud, it is a long way from that fact to the conclusion that Linn's location is open to the suspicion of fraud. This is the only evidence taken in connection with the nature of the relations and transactions between Linn and French, from which respondents claim proof of fraud.

The conclusions respondents seek to draw are that this agreement showed a desire upon the part of the original Tiger Company to get more ground than they could hold by location; that they took the south half of the Thorne and Cassidy claim, which was the half nearest the original location; that Linn's location lay between; that it was made by French without Linn's knowledge; that, therefore, it was the intention of the Tiger Company to have Linn's location at the time it was made. To this, the first answer is, the whole vein was open to location at the time the original location was made; the locations were all made the same day and by the same person. The original locators took only

one thousand two hundred feet. If they had wanted more ground, they could have taken it, even to the extent of three thousand feet. The very fact that they did not locate for themselves the two hundred feet of Linn's location and the south two hundred feet of the Thorne and Cassidy claim, if it shows anything as to this matter, shows that the original locators did not want that ground in their company. Second, the agreement with Thorne and Cassidy was not an agreement by them with the original locators of the Tiger, but with the individual named Moreland, and it was not an agreement for the south half any more than for the north half. It was not an agreement to segregate any particular part, but simply an agreement to convey to Moreland one half the premises. Moreland, for reasons which are not explained in the record, got Thorne and Cassidy to consent to segregate the south half of their claim, and also, for reasons not explained, or in any way alluded to in the record, gave the original locators the benefit of his agreement with Thorne and Cassidy, and had the deed from them for that half-interest made directly to the original locators on the vein. But there is nothing to show that Linn knew anything of this, or that he consented to any plan they might have had in regard to his location. We do not see in these facts anything which even tends in any way to taint Linn's location with fraud of any kind. If the verdict of the jury was based on the theory that the evidence did not show authority for the location, it should be set aside, because no proof of authority was necessary. The new trial should have been granted.

Judgment reversed and new trial ordered.

JOHN G. CAMPBELL AND JAMES M. BAKER v.
DANIEL W. SHIVERS.

JUDGES OF SUPREME COURT HAVE POWER TO APPOINT REGULAR TERMS of the district courts for the several districts of this territory.

POSSESSION OF ONE TENANT IN COMMON IS THE POSSESSION OF ALL the co-tenants, and this unity of possession can only be dissolved by proceedings in partition, or by amicable agreement.

UNINTERRUPTED ADVERSE POSSESSION OF WATER RIGHT FOR FIVE YEARS, under a claim of right, gives a valid title.

A. T. REFS. I—11

DECLARATIONS MADE BY PARTIES CLAIMING A WATER RIGHT that they would not permit a certain person to have any of the water, if made in the absence of such person and without his knowledge, are not admissible in evidence against him, in an action brought by such claimants to recover damages for the water taken by him.

EXCEPTION MUST REFER TO SOME PORTION OF THE EVIDENCE in a case, in order to be of any avail to the party who makes it.

PARTY ASSERTING TITLE UNDER DEED IS NOT CONFINED TO IT, but may claim under any other title.

WHERE ONE PERSON MAKES DECLARATION TO ANOTHER that a third person is a joint owner with him in a water right, and such other person, relying on such declaration, purchases the interest of the third person, records his deed, and enters into possession, the person making the declaration will be estopped from denying the right of such purchaser. And those claiming under the person who made such declaration will be thereby put upon inquiry as to the true state of the title.

TO INSTRUCT JURY THAT THERE MUST BE PREPONDERANCE OF EVIDENCE in favor of a party to entitle him to a verdict is not error.

APPEAL from the district court of the third judicial district. The opinion states the case.

Coles Bashford, for the appellants.

J. E. McCaffry and *John A. Rush*, for the respondent.

By Court, TITUS, C. J.:

Judgment for the defendant, Daniel W. Shivers, in the district court of the third judicial district, at the suit of the plaintiffs, John G. Campbell and James M. Baker, for the alleged unlawful use of water in irrigation, is the cause of this appeal. The appellants here were the plaintiffs below, the defendant there is the respondent here; and the record by the transcript discloses the following conclusions of-fact: In the month of March, 1867, the defendant moved to Chino valley, in the county of Yavapai, near Fort Whipple, about twenty-five miles north of Prescott, took possession of the ranch which he now occupies, and has ever since occupied the same. Along with this, his ranch, he has ever since used and still continues to use, for purposes of irrigation, one fourth of the water which flows through a certain ditch or drain, not only to or through the defendant's ranch, but also to or through the ranches of Robert Postle, George Banghart, and the ranch of the plaintiffs. The use of the one fourth of the water flowing through the ditch or drain

above described from February 1, 1870, to January 1, 1872, is the wrong of which the plaintiffs complain; and they claim, with their costs, damages in the sum of two thousand dollars, which they aver they have suffered by this alleged unlawful use of the water described. The defendant denies that his use of the water described was unlawful at all, denies that he has damaged the plaintiffs, and asks to be dismissed with his costs.

This is the issue tried in the court below, and the correctness of the verdict and judgment thereupon in favor of the defendant is the question to be reviewed here in this court.

It is to be regretted that the settlement in Chino valley, of which the property in question constitutes part, was not more fully and correctly described than it is in the record of the present case. The ranch of the plaintiffs, in two of the deeds submitted in evidence on the trial of the case, is described as situated west of Postle's ranch; while the same ranch, in two other deeds submitted in evidence on the trial of the case, is described as situated north of Postle's ranch. The order of the several ranches on the ditch or drain, which conducts the water for their common irrigation, is not given; while their boundaries are entirely omitted, not only in the pleadings and evidence, but even in such deeds of them as have been submitted in evidence on the trial of this cause. The water right in controversy is wholly omitted from the original deed of the plaintiffs' title, as the same appears in evidence, while their counsel is found denying the defendant's claim to contest this very right with them, because of the same omission from his own deed. The court is thus left to conjecture, and counsel are involved in absurdity on matters of the utmost importance in the discussion of questions such as the present case presents.

It seems that Postle's ranch is above all others on the ditch or drain which is the common medium of supply, and about three quarters of a mile from the mass of the water upon which all depend. The relative positions of the plaintiffs' and defendant's ranches do not appear except from conjecture. Of all those who depend on a single drain or ditch for water, it is impossible for any one to exhaust or reduce the supply of others, excepting such as are below him on the same ditch or drain.

The plaintiffs claim that the defendant has done this for them. From this, it would seem to be a presumption of fact, therefore, that the ranch of the defendant is higher up the ditch or drain, and nearer the common source of the water supply, than the ranch of the plaintiffs. Of ranches located or selected for purposes of irrigation, other things being equal, those nearest the water supply are first chosen. From this it would also seem to be a presumption of fact that the ranch of the defendant must have been located, if not anterior to, at least contemporaneous with, that of the plaintiffs. The legal deductions from these presumptions of fact will be stated hereafter.

Further reference to the facts of this case will be made in connection with the points to which they pertain.

No assignment of errors has been made in this case, excepting such as appear in the briefs of counsel.

The points presented by the counsel of the appellants against the judgment in this case are as follows:

“1. The court erred in charging the jury, that if defendant had been in possession of the said property for five years, that plaintiffs must fail in this action.”

“The owners of the property in question were tenants in common of the water right—the possession of one being the possession of all.”

“2. The court erred in rejecting the evidence offered by plaintiffs of a meeting held by Banghart, Brown, and Postle, in which the two former refused to let defendant have any of the water claimed by them, that Postle said he would let him have part of his, and that there was no other understanding between them.

“3. The court erred in refusing to give the third instruction asked for by plaintiffs’ counsel: ‘That defendant having asserted a right under the deed of Degrallo is bound by it, and that the statute of limitations does not begin to run until he claims under the right now set up by him.’

“4. The court erred in charging the jury that plaintiffs were estopped by the declarations of Brown.

“5. The court erred in its charge to the jury that there must be a preponderance of evidence in favor of plaintiffs, to enable them to recover.

"6. The court should have sustained the objection of the plaintiffs: 'That the court was not legally in session.'"

As the last of the above-cited exceptions is first in practical order, and if allowed must impel this court to reverse the judgment in the present case, it is proposed to consider it first.

The legislature of this territory has, from its origin, assumed that it is authorized to fix the terms of the supreme and district courts. Till the present case, no conflict has arisen on this subject between this court and the legislature, because the practice of the court has been to adopt and ratify the action of the legislature in regard to the terms of the district courts.

At its session of 1871, the legislature enacted on this subject as follows: "The district courts in the several counties of the territory shall be held as follows, to wit:

"In the county of Pima, on the first Mondays of March and October of each year. In the county of Yuma, on the third Monday in March, and the first Monday in November of each year. In the county of Yavapai, on the third Mondays in June and November of each year."

This distribution of the terms of the district courts was undoubtedly a defective execution of the order of congress, because it contained no limitation to the sessions of the court. It was just such legislation as enabled a Mormon district judge to sit one hundred and twenty days, not for the transaction of business, but to charge the federal government an enormous bill of expenses—an abuse, or rather one of the abuses, which induced the act of congress of 1856, which will be cited hereafter. The ratifying order of the supreme court supplied this defect by imposing the necessary limitation.

It was found, however, that the interval—only two weeks—between the Yuma and Yavapai terms was absolutely too brief to enable the United States district attorney to transact the United States business at one of these courts, and reach the other in time for it there.

Accordingly, the legislature was invited to join the judges of the supreme court in amending this order—not because these judges doubted their power to make the order alone, but to avoid every appearance of disrespect towards the

legislature, and all possibility of exception, such as has been taken in the present case. The legislature refused to act, and the judges of the supreme court, not doubting their authority, made and promulgated the following order:

“Order of the supreme court of Arizona:

“Until the further order of this court, the terms of the district courts of the several districts of the territory of Arizona shall, respectively, commence at the times hereafter mentioned, and shall continue so long as may be necessary to transact the business before the respective courts, and no longer. In the first district, on the first Monday in March and the first Monday in October. In the second district, on the first Monday in April and first Monday in December. And in the third district, on the first Monday in June and first Monday in November.

“By order of the court, February 11, 1873.

“(Signed)

“JOHN TITUS, C. J.

“C. A. TWEED, Asso. Justice.

“DE FOREST PORTER, Asso. Justice.”

In the order thus made, this court imposed upon the terms the only limit practicable in the case, that is, the whole of the two periods between the commencements of the respective terms. The court limited the sessions of the respective district courts to the time necessary to transact the business before the respective courts.

The changes thus made in the terms of the respective courts were *imperatively necessary* for the transaction of the judicial business of this territory.

The session and term of the district court of the third judicial district, and in and to which the exception of the present case was taken, was the semi-annual term, for both federal and territorial business, and for the whole district, with juries, grand and petit, called from all parts of such district.

The authority of this court to make the order in question is derived from the act of congress of August 16, 1856, 11 Sts. at L., p. 49, which is as follows:

“Sec. 5. That the judges of the supreme court in each of the territories, or a majority of them, shall, when assembled in their respective seats of government, fix and appoint the

several times and places of holding the several courts in their respective districts, and limit the duration of the terms thereof; *provided*, that the said courts shall not be held at more than three places in any one territory; *and provided, further*, that the judge or judges holding such courts shall adjourn the same, without day, at any time before the expiration of such terms, whenever in his or their opinion the further continuance thereof is not necessary."

A brief reference to the character and history of the act, of which the section cited is part, will show that it is fundamental to all the territories, remains unrepealed, and will probably so continue till the last territory shall take its place in the galaxy of states. This act consists of fifteen sections, and its title shows its comprehensive character: "An act to amend the acts regulating the fees, costs, and other judicial expenses of the government, in the states, territories, and District of Columbia, and for other purposes." No part of this act appears to have been repealed, certainly not the provision applicable to the present case, as appears by the large volume of our new federal code, sec. 1920, recently published.

The history of this act is one of much interest. Before and at the time of its passage, considerable dissatisfaction had existed, in most if not all the territories, with the operations of the federal government. "Territorial sovereignty" was announced as a favorite dogma of a certain school of active politicians. In Kansas and Utah, organized resistance more or less flagrant was made to the federal officers, especially the judges of the district courts. The president of the United States, during the session of congress by which this act was passed, in his "Proclamation respecting disturbances in Kansas," 11 Sts. at L., p. 791, uses this language in respect to the territory of Kansas: "It appearing that combinations have been formed therein to resist the execution of the territorial laws, and thus, in effect, subvert by violence all present constitutional and legal authority," etc. Part of this system was to intimidate or embarrass the federal judges, and thus prevent their administration. In Utah the state of society was, if possible, worse than in Kansas. Two years later, it there culminated in armed rebellion, so that the president of the United

States, in his "Proclamation respecting the rebellion and Mormon troubles in the territory of Utah," 11 Sts. at L., p. 796, employs, among other topics, this language: "Judges have been violently interrupted in the performance of their functions, and the records of the courts have been seized and either destroyed or concealed." There, as in Kansas, the legislature embarrassed the federal judges not of Mormon faith by denying them all legal aid, such as refusing to fix the times and places of their sessions. It was this last practice which induced the act of 1856, above cited, enabling the federal judges to fix their own terms. Enormous expenses were accumulated against the federal government by all in Utah whom the Mormons could control. This led to the severe system of accounting provided for in the act under consideration.

Careful consideration of section 5 of the act of 1856, above cited, shows that it intended to enable the United States judges in the territories to appoint the terms of their own district courts, independently of legislative control. No respectable authority, it is submitted, has been or can be cited which conflicts with this conclusion. The opinion of Judge Conkling certainly does not. His treatise was written eight years before the organic act of New Mexico was passed, and twenty years before Arizona was organized. Commenting on this topic in his treatise, p. 201, he says: "But by a general act of August 16, 1856, c. 124, 11 Sts. at L., p. 49, the judges of the supreme court of the several territories are required"—this is his own language—to do what? "When assembled at their respective seats of government, to fix and appoint the several times and places of holding the several courts in their respective districts," etc. The learned commentator has misquoted the law under consideration, but he has not so far mistaken as to deny its true operation, for he not only concedes to the judges of the territorial supreme courts the authority to fix the terms of their respective district courts, but declares they are required to do so.

The act of June 14, 1858, 11 Sts. at L., p. 366, furnishes no rule for the construction of the act of 1856, already cited. It is perfectly apparent that were the authority given the federal judges to fix the times and places, or either, of holding the county courts, without anything more, such

grant of authority would be futile. The judges would have no means of paying the expenses of these courts, and the United States refuse to pay them. Congress did not intend to confer on the federal judges of the territories the authority to appoint county courts, while withholding from them the means of its execution. It has wisely left the authority of fixing the county courts to the territories, or the counties themselves by which the expenses are to be paid. This was obviously the intention of congress in making this difference between these statutes, and not "forgetfulness" of the act of 1856.

The case of *Klopper v. Keller*, 1 Col. 410, is no authority in this case. It was tried at a special county court, in which the act of 1856 could not legitimately come in question. It presents, therefore, the case of a mere *obiter dictum*, decided under a Colorado statute, passed in accordance with the organic law of that territory framed in 1861. Chief Justice Hallett, who announced this *dictum*, based it on the fact that the enabling power of congress in the organic law of Colorado, and the territorial statute passed under it, were both subsequent to the congressional act of 1856. Our organic law, on the contrary, is six years prior to the act of 1856. The cases cited in the case above entitled are not more applicable to the courts of this territory than the principal one.

Dunphy v. Kleinsmith, 11 Wall. 610, is more applicable to the case in controversy than the opinion cited in argument from Conkling, or that of *Klopper v. Keller*, from 1 Col. 410. In that case the power of a Montana court to try an equity case by jury was absolutely denied, and the legitimacy of a jury of nine was seriously questioned by the supreme court of the United States, with all the power a territorial legislature can confer. This case shows that the powers conferred by congress on the United States courts in the territories are not to be impaired by territorial legislation.

The supreme judges of this territory, therefore, had the power to appoint the regular terms of the district courts, for each of the several entire districts; and this exception to the contrary is overruled.

The error first assigned on the brief of appellants' counsel and the one next to be considered is as follows:

"1. The court erred in charging the jury that if defendant had been in possession of the said property five years, plaintiffs must fail in this action."

To this the appellants' counsel adds: "The owners of the property in question were tenants in common of the ditch and water right—the possession of one being the possession of all."

The latter statement is certainly true, and it is an abandonment of this exception. This unity of possession, which makes the defendant a tenant in common with the plaintiffs, protects him from all disturbance by them or either of them. He can call upon them to account for any invasion of his rights, and his unity of possession can only be dissolved by proceedings in partition, or by amicable agreement.

If this is not so, then from all that appears in the present case, the five years and some months which elapsed between the defendant's entry upon the enjoyment of the water right in March, 1867, and the institution of this suit in August, 1872, must bar the plaintiffs' recovery. *Compiled Laws*, p. 331, sec. 3.

From all that appears in the present case, therefore, the defendant is entitled to the protection which is due to a tenant in common, or to the statute of limitations, and in either event this exception must be and is overruled.

The next exception is as follows:

"2. The court in rejecting the evidence offered by plaintiffs of a meeting held by Banghart, Brown, and Postle, in which the two former refused to let defendant have any of the water claimed by them; that Postle said he would let him have of his, and that there was no other understanding between the parties."

No legal right of the plaintiffs was infringed by the rejection of this evidence. The defendant was not present at this meeting, either personally or by representation. The declarations of the persons present, whether confined to the parties themselves or communicated to the defendant, could not affect his legal rights, unless it should appear that he in some way accepted or assented to them. It does not appear that his acceptance or assent was shown or proposed to be shown. This exception is therefore overruled.

The third exception is as follows:

"3. The court erred in refusing to give the third instruction asked for by plaintiffs' counsel: 'That defendant having asserted a right under the deed of Degrallo is bound by it, and that the statute of limitations does not begin to run until he claims under the right now set up by him.'"

It does not clearly appear, either from the record or the argument upon it, what is meant by this exception. To be at all available for the plaintiffs, it must be found to refer to some portion of the evidence in the case. The only portion of the evidence in the case to which this exception appears to be responsive is defendant's allegation, that "early in 1867 Brown offered him a ranch in Chino valley, as an inducement for him to bring his family and settle there." This seems to be that which this exception describes as "the right now set up by him." The exception assumes that this is in some way fatally conflicting with the "defendant's having asserted a right under the deeds of Degrallo," and that this severed the tenancy in common, which is asserted by the plaintiffs' first exception, and formed an era in the case which put the statute of limitations in active operation. Such, however, is not the legal effect of this testimony. There is really no conflict in the defendant's claiming at one time under Degrallo's deed, and at another under Brown's promise. They are parts of one complex transaction, in which the deed appears as the fulfillment of the promise previously made. The defendant might at one time assert that Brown's promise was the consideration which actuated him; at another, the five hundred dollars mentioned in Degrallo's deed; at another, the deed itself; and at other times any two of these, or all three of them together: and yet by these he would forfeit no legal right and incur no legal hazard. The defendant, in his conversations on this subject with Brown himself, or with Brown's grantees, would naturally refer to Brown's promise; with strangers, to Degrallo's deed; and in stating the cost of his ranch and water right to anybody, he might allege the five hundred dollars mentioned in the deed, by which he and his must expect to hold them, and be guilty of no breach of legal or moral truth, and incur no forfeiture or hazard.

No error appears in the charge thus excepted to, and the exception must be overruled.

The fourth exception is as follows:

“4. The court erred in its charge to the jury, that plaintiffs were estopped by the declarations of Brown.”

The exception does not fully state the charge of the judge upon the trial of this case, nor the evidence to which it refers. The charge was this: “Again, if Brown did represent to defendant while he, Brown, was in possession of the property now claimed by the plaintiffs, that one fourth of the water flowing in the ditch was the property of Degrallo, and used the inducements alleged to induce the defendant to go there and settle, and defendant, relying on his representations, did so go to that valley and enter upon the possession of the ranch and water right, under and by virtue of any alleged purchase or agreement by Brown, or Brown and Postle, from or with Degrallo, these plaintiffs are estopped, as Brown himself would be if he were the plaintiff in this action, from denying such right of defendant to one fourth interest in the water right forever after—and this if Degrallo never had any right or interest in the property whatever, or if there was no such man in being.”

The whole of this exception must be taken together, with the evidence to which it refers, in estimating its legal effect in this case. On recurring to the testimony, we find that the defendant took possession of his ranch and one fourth of the water now in controversy in March, 1867, and has ever since used and enjoyed both, and that the deed of Degrallo to defendant was recorded April 11, 1867. Brown's deed to Schneider is dated November, 1867; Schneider's deed to Campbell, one of the plaintiffs, and Buffum, is dated August, 1868; and Campbell's deed to Baker, the other plaintiff, is dated March, 1872. The only principle upon which Brown's grantees, the present plaintiffs, can deny the binding effect upon them of Brown's declarations concerning the water to the defendant, would be that they had no notice of them. In respect to this, the presumption of law is, that Campbell and Baker exercised ordinary diligence in ascertaining the conditions and relations of their ranch at the time they took possession of it in November, 1867, and in March, 1872.

The law requires of them ordinary diligence, in all such matters as this water controversy, in which others are concerned. *Vigilantibus non dormientibus subservit lex.* The law will hardly take from the defendant his ditch water and give it to the plaintiffs in pity or approval of their self-imposed ignorance at the time they purchased their present ranch. The evidence shows that if they then made the ordinary efforts to learn the extent of their water rights, they found the defendant in possession and enjoyment of the one fourth of the water now in controversy, his deed of record for the ranch he occupied and farmed, and the public repute of the locality conceding the defendant's right to the water of which the plaintiffs now seek to deprive him. The evidence shows that John G. Campbell, one of the plaintiffs in this case, made his tenant, D. R. Poland, understand that the defendant owned the one fourth of the water in controversy at the time of their engagement in 1868. It is somewhat significant that in Brown's deed to Schneider, of November 5, 1868, for the ranch which the plaintiffs now claim, there is no mention of any ditch or water right whatever, and that the quantity is not stated in any of the subsequent deeds for the same property. If this court had any doubt of the conclusion above stated, the defendant's right could be maintained on the ground of parol license.

It has none, however, and this exception must be and is overruled.

The fifth and last exception is as follows:

"5. The court erred in its charge to the jury, that there must be a *preponderance* of evidence in favor of plaintiffs to entitle them to recover."

The proposition thus excepted to would seem so axiomatic as to defy either question or discussion. If in any case the evidence should be equal on one side and on the other, how could the jury find a verdict at all? The jury would be compelled to agree to disagree in such a case, and thus the trial would fail. In cases such as this, if they actually do occur, it is the highest duty of the jury to disagree. To enable a jury, therefore, to find a verdict at all, in any case in which there is conflict of testimony, there must be a preponderance of evidence in favor of one side, and the jury

must find it as a condition precedent to the rendition of their verdict. That the judge thus stated a truism to the jury on the trial of this cause, is no matter of successful exception.

And this exception is accordingly overruled.

The exceptions of the appellants thus all fail, and there is nothing else in the record to show why the judgment in this case should not be affirmed.

This conclusion, it is submitted, if there were any doubt of its legality, could be sustained on the evidence which the case presents of a parol license to the defendant of the water right in controversy.

And the same conclusion is reached by another most simple process of investigation. It was found as a presumption of fact in the statement of this case, that the defendant was located higher up on the ditch and nearer the source of water supply than the plaintiffs; and also, as another presumption of fact, that his location was therefore older than theirs. By a very simple deduction the legal conclusion, therefore, is, *prior in tempore, potior in jure*, in the absence of all sufficient evidence to the contrary, that the defendant's right is better than the plaintiffs'.

The judgment of the court below in the present case is therefore hereby affirmed.

TWEED, A. J., concurred.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1875.

RUFUS E. ELDRED, APPELLANT, *v.* SOLOMON WARNER, ADMINISTRATOR OF THE ESTATE OF GEORGE M. NEWSOME, DECEASED, RESPONDENT.

WHERE TWO PERSONS DOING BUSINESS AS PARTNERS AGREE IN WRITING that, in case of the death of either of them, the survivor shall settle the business of the partnership, and after paying the just debts of the partnership and of the deceased, shall have all the remaining property of every kind for his sole use and benefit, without any process of law whatsoever, accounting only to the creditors of the partnership and of the deceased partner, a complaint filed, after the death of one of the parties, in the district court by the survivor, setting up the agreement and asking that the administrator of the deceased party be required to turn over to him all the property in his possession belonging to the estate of the deceased, and offering, on the part of the plaintiff, to perform all the terms and conditions of the agreement, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

APPEAL from a judgment of the district court of the first judicial district, county of Pima, sustaining the demurrer to the complaint. The facts are fully stated in the dissenting opinion delivered by Chief Justice Dunne.

McCarty, Clark, and C. W. C. Rowell, for the appellant.

The only and main objection to the complaint in the court below was as to the sufficiency in law of the agreement or compact set forth in the complaint.

It is alleged by the respondent that the said agreement or compact is not an agreement or compact recognized by law, but if it be anything at all under the law, it is a will. In order to show that such compact or agreement is not a will but a contract, let us in the first place consider the contract in question in the light of a contract relating exclusively to realty, that is, as if the subject-matter were real instead of personal property. Let us also present to ourselves at first cases upon which the law is plain and undoubted, and then by illustration and analytical reasoning, and a knowledge of all the facts and circumstances attendant upon the case at issue, endeavor to bring it within the rule.

It is well understood that contracts for the sale of land founded upon a valuable consideration, where no fraud or other destroying agency appears, are always held valid and will be enforced in equity. A valuable consideration may be money, marriage, etc., or it may be an exchange. Now if A., for example, should enter into a written contract with B. to sell to B. a certain piece of land, at a certain given time, upon the payment by B. to him of the sum of one hundred dollars, just as soon as that certain time has arrived, and B. has made said payment or offered so to do, a court of equity would certainly compel A. to execute a deed of the land in question to B.

This must be admitted to be a plain case, upon which the authorities are unanimous. The contract would be what is deemed an executory contract, until the time named in the contract had arrived, when it would immediately by operation of law become converted into an executed contract, and an action thereon for specific performance would lie. Now let us proceed a little further in our course of illustration and reasoning, and by changing to a slight extent the terms of said contract, advance a step toward the conclusion at which we are desirous of arriving. Instead of a certain time named, we will insert the words "when peace shall be declared," making the contract, or in other words its perform-

ance, depend entirely upon a contingency. Here we have a contract whose performance is based upon a contingent event, upon an uncertainty; for peace might never be declared, and the contract remain forever a dead letter. Still it is based upon a valuable consideration, at the same time is perfectly valid, and only awaits the happening of the contingency named to don the robes of an executed contract, upon which an action for specific performance would lie, and which equity is bound to enforce.

Let us go a step further: suppose A., in consideration of one hundred dollars, contracts in writing with B. that upon A.'s death certain land shall belong to and vest in B. Now we are all aware that nothing is more certain than death, but in law it is deemed a contingency, because of the uncertainty of the time of its happening. Now both of the last two contracts are based upon contingencies, upon the happening of which—the “declaration of peace” in the one, and the fact of death in the other—they become executed contracts, and may and must be enforced in equity. A person may dispose of his property in any way or manner he desires; he may, if not laboring under any legal disability, enter into any contract for the disposal of his property, either before or after his death, as he wishes. The law does not and can not restrain him in this particular, unless it be done in subversion or in fraud of the rights of others.

A person desirous of disposing of his property after death may make a will, but most certainly the law does not limit him to that particular form or method of procedure. He has the right to say in what form his property shall be after death, and to whom it shall go. And we claim that if a valuable or legal consideration be apparent upon the face of a contract made and signed by him, he may dispose of such property by such contract as well as by will. If he desires to make a contract with B. that upon the payment of a certain sum, after the death of B., certain property shall belong to him, it is a good and valid contract, and the law will enforce it. In such case it is merely a change in the form of property. His legal representatives will be obliged to conform to the terms of the contract, and especially in case it was further provided that B. should pay the debts of A. over and above the certain consideration named. The rep-

representatives of A. will not be allowed to object in the case named. They are merely beneficiaries at best; the decedent has chosen to change the nature of his property by contract, and beggars can not be choosers. The above cases are plain and simple, and so tangible in fact that they may be readily grasped by any legal mind. For that purpose we have selected them, and the conclusions we have drawn from them we consider correct and incontrovertible. We desire them viewed stripped of every species of fraud, and the parties to them of every legal disability.

The law is an affectionate guardian, and will always follow the wishes and intentions of the parties with whom it has to deal, unless its rules are openly violated and trampled upon. Now in the examples before cited, real property alone has been the subject-matter of the contract. Would not the same cases apply and the same rules follow if it were personal property? We contend that they would.

The only distinction is the character of the property. Contracts relating to realty may be enforced in equity; so may those relating to personalty, under certain circumstances. Those circumstances in general, and especially those concerning the particular question at issue, will hereafter be considered in detail. But assuming, for the purposes of this argument, that all of the required circumstances were connected with this contract, whose subject-matter is personalty, we are forced to find that the law regarding the right and the remedy is just the same whether the subject-matter be real or personal property. We have seen cases where contracts could be conditional upon death and be performed thereafter.

And here we will remark, that in accordance with the preceding argument it could be no objection to say that because a contract can not be performed by its conditions during the life of a party making such contract, that it can not be performed after death.

All contracts of insurance depend upon a contingency, and that contingency is death. We will review this point more particularly hereafter. If a party may confer a benefit upon his legal representatives, whether it be by will, contract, or otherwise, he may also impose a responsibility to the extent of the value of his property. This responsibility

may be imposed by the decedent, either by an obligation incurred and fixed during his life-time, or by an obligation incurred during his life-time but to take place after death. It is but the following out of his intentions, concerning which the law is so careful, and of which it is such a faithful guardian. Let us advance a step further. Though joint tenancy has been abolished by the statutes of numerous states, still at the same time no one will deny that a contract declaring an ownership in land in the nature of a joint tenancy can be created and enforced in law. For instance, A. and B. are owners of contiguous pieces of land of equal value; thus being, they enter into a mutual written contract, the terms of which are, that upon the death of one the whole of the land shall go to and vest in the survivor. In such case the parties might not be styled in law joint tenants, but their ownership of the land under the contract would be *quasi* joint tenancy, and would be enforced under the law of England and the United States. Here the contract is again executory, the consideration being in the nature of an exchange. It is also a contingent contract, dependent upon the death of one of the parties; but immediately upon the happening of the death it becomes an executed contract in favor of the survivor. Can any one deny the validity of this contract?

It can not be said to be *contra bonos mores*, no more so than that contract whereby a creditor insures the life of his debtor. They are of one and the same nature, so far as public policy and public morals are concerned. Will any one deny but that a contingent cross-remainder created by will may be vested in two persons? Certainly not. Then what are the relative conditions of the two parties enjoying a contingent cross-remainder? Stripped of all verbiage, they are exactly similar to those of A. and B. above named. In the latter case they are created by the act of a third party, whilst in the former they are created by the willing act of the parties themselves. Then most certainly if the conditions of a contingent cross-remainder may be thrust upon parties, they perhaps unwilling, then in all law and reason those same conditions may be created by deed or contract between parties perfectly willing.

We think that we have satisfactorily disposed of all ob-

jections that might arise to such a contract, and proved plainly that it would be considered and held valid in law and equity. Such being the case, if the legal representative of the deceased party should refuse to comply with the terms of the contract, an action for specific performance thereof would lie against it there. Of course a joint tenancy or a contingent cross-remainder in relation to personal property might not have existed under the common law, but we contend that the same general principles of the law govern and determine such matters, whether they relate to real or personal property. Those principles are the foundation upon which all laws concerning contracts are based, and they govern from the foundation to the turret. And if all the acts necessary to be done in relation to contracts of a personal nature are done, the same right and the same remedy are applicable. We have thus far shown that under existing conditions and circumstances the laws which govern specific performance, in cases where realty is involved, apply to cases where personal property alone is the subject of controversy. Let us now consider those conditions and circumstances as far as they apply to the case at issue. Specific performance of contracts relating to personalty is decreed by courts of equity: 1. When there is no speedy or adequate remedy at law; 2. When the party applying can not be compensated by damages; 3. When the value of the property in controversy, in contemplation of the party so applying, is far above the actual price or money worth. We will consider the last reason first.

It is alleged in the bill that the appellant and the said George M. Newsome, deceased, were partners; that a great deal of affection existed between them; that the appellant sets a far higher price upon the diamonds mentioned and described in the bill than their actual value, even if that value could be ascertained.

The degree of affection with which he held the memory of George M. Newsome, or the diamonds in controversy, as mementos of the deceased, is not a subject for inquiry; it is sufficient in this case if it be alleged in the bill. The second ground for equitable interposition upon which we have chosen to stand is that the appellant, if forced to maintain his action at law and await there his remedy, could not

be compensated in damages. It is a well-established principle that when a party at law can not obtain a righteous judgment, or where the subject-matter in controversy is of such a character that the real and intrinsic value can not be ascertained, there, in such event, equity reaches forth her hand and grants relief. It is averred in the bill that the diamonds in controversy are exceedingly valuable, but that their value can not be ascertained without the aid of an experienced lapidary and that such experienced lapidary is not within the jurisdiction of the court; that if the court should refuse to interpose, money damages would not compensate him for his loss.

Equity does, and must to a great extent, adapt herself to the particular circumstances of every case that comes before her. The appellant, if he should be compelled to proceed at law alone for his relief, might probably suffer irreparable loss, and yet at the same time might be fully and duly compensated. But a court of equity does not act upon conjecture, nor trust to probabilities or possibilities, but acts at once in such a case as this and thereby prevents any possibility of a loss or injury. The third and last ground upon which we rely is, that there is no speedy or adequate remedy at law; the objection to this ground, if any there be, is disposed of in the same manner as the last. For most certainly if a party can not be compensated by damages, his remedy can not be adequate. For those reasons, we deem the action well brought and that specific performance will lie.

Now let us descant more fully upon the consideration of the agreement in question. In *Beckley v. Newland*, a case cited in 1 Story's Equity, section 343, note, the court decided that the "reciprocal benefit of the chance" was a sufficient consideration. If that case be law—and we have discovered no other yet which overrules it—the question of consideration, as far as it relates to this case, is decided, for this case presents a stronger front than that in *Beckley v. Newland*. In the latter it rested entirely upon the whim of Turgis. He might have so disposed of his property by will as to completely disinherit both of his sisters named in the case. It all rested in chance.

The case in question presents a far different view. There is no fraud shown or pleaded, there is no undue influence

manifested by either party to the agreement. The law will presume, and must presume, that they entered upon the compact in question fully cognizant of all matters and property pertaining thereto. That they considered and determined the consideration expressed, fully ample and sufficient. As they were then, so, by the presumption of law, they are to-day. If the consideration was sufficient then, it is sufficient now. The question as to whether they or either of them could have disposed of their property during their life-time by sale or barter, or after death by will, does not arise in this case, for such facts, if they exist at all, are not of record and can not be considered.

George M. Newsome enjoyed the benefit of the agreement during his life-time, and if God in his wisdom had so ordained that the appellant in this case should be the first to die, then in such event he would have reaped the advantages of the compact. He enjoyed the benefit of the chance, and in accordance with the case of *Beckley v. Newland*, before cited, such was the consideration. Let us illustrate further: Suppose A. and B. should deposit with a third party the sum of one thousand dollars each, together with a written agreement to the effect that whenever one should die the survivor should be authorized to receive the whole amount deposited, viz., the two thousand dollars. Would not such agreement be binding after the contingency had happened, namely, the death of either of the parties? Most assuredly we contend that it would, and the person surviving would be allowed to receive the money. But let us place it in a stronger light: For instance, the same sum of money should be deposited by A. and B. in the manner above stated, only excepting that the agreement was that upon the death of either of them the whole sum of two thousand dollars should go to the legal representatives of the party first dying. This would certainly be perfect, valid, and legal, for it is upon this principle that are based all the mutual protective associations that to-day are organized and working in the various states of the Union and recognized by law. If the latter illustration be founded on good law—and such fact can not be doubted—then the former one must necessarily be correct. It is in the nature of a *quasi* insurance. Now let us go a step further: If the above illustration be based upon correct

principles of law, then most certainly the one which is about to be presented must follow in its wake. Suppose A. and B., instead of depositing the two thousand dollars before mentioned, should merely deposit an agreement in writing, wherein each gave this written promise to pay to the survivor the sum of one thousand dollars. Here they do not deposit money but its representative in paper. Is not this a valid contract? Most certainly you can not discriminate between the former illustration and this one; the law and the principle are just the same in both. Then if this be law, is not the agreement in controversy legal? There is no difference between the cases. Here is the agreement, here is the property, the representation of money. You may style it a case of *quasi* insurance if the term may be allowed, the only difference being, that the dead pays to the living, instead of the living to the dead.

It is not necessary that an instrument disposing of property after death should be a will, nor is such an instrument construed as a will, as will be seen by the following cases: *vide* 2 Story's Eq., sec. 786; *De Beil v. Thomson*, 43 Eng. Ch. 468; S. C., 3 Beav. 469.

J. E. McCaffry, for the respondent.

The complaint filed herein is in the nature of a bill in equity for the specific performance, by an administrator, of the terms of an instrument executed by the deceased in his life-time, and claimed by plaintiff to be an executory contract or compact, but showing upon its face that it was intended for the mutual will of deceased and plaintiff.

The instrument is set forth at length in the transcript. The appeal is from the order of the district court sustaining the demurrer to the complaint.

The instrument in question, if valid for any purpose, can only be considered as a will. 4 Kent's Com. 633; *Schumaker v. Schmidt et al.*, 4 Am. Rep. 135, 137, 139, 140; *Brewer, Adm'r, v. Baxter et al.*, 5 Id. 530, 532; Redfield on the Law of Wills, c. 2, sec. 2; *Martindale v. Warner*, 15 Pa. St. 479, 480. And it can not in any event be considered as a claim against the estate. Probate Laws of Arizona, secs. 128, 130, 131, 133, 139, 140, 145, 147, 150, 220; *Fallon v. Butler*, 21 Cal. 31, 32, 33. If it be a will, it must first be presented to

the probate court of the proper county. Probate Laws of Arizona, secs. 3, 4, 12, 13, 294; *Pond v. Pond*, 10 Cal. 500. As the jurisdiction of the district court is not original, but appellate. Comp. Laws, 376, secs. 13, 14. But the instrument can not be considered as a valid will. Comp. Laws, 250, sec. 5; *Aller's Appeal*, 5 Am. Rep. 434, 435, 436.

By COURT:

An appeal from a judgment in the first judicial district, county of Pima, and territory of Arizona, wherein said Rufus E. Eldred was plaintiff, and the said Solomon Warner, administrator of the estate of George M. Newsome, deceased, was defendant. The appeal is from the judgment entered in this cause on the fourteenth day of October, A. D. 1874, that the demurrer filed in said cause be sustained. It is now, on motion of McCarty and Clark for the appellant, after hearing James E. McCaffry for the respondent, adjudged that the said judgment be reversed and the cause remanded to the said district court for further proceedings.

DUNNE, C. J., delivered the following dissenting opinion:

I am unable to concur with my learned associates in the disposition made of this case. The record is as follows: "On the fourteenth of May, 1874, the following bill in equity was filed in the district court of the first judicial district:

"Territory of Arizona, county of Pima. In district court, first judicial district. Rufus E. Eldred, plaintiff, v. Solomon Warner, administrator of the estate of George M. Newsome, deceased, defendant.

"Now by attorney comes the above-named plaintiff, and complaining of the defendant herein, for cause of action avers and shows, that heretofore, to wit, on the twenty-first day of February, A. D. 1874, at the village of Tucson, county of Pima, and territory of Arizona, one George M. Newsome, then and there being a resident, died intestate and leaving property and estate within the said county; that thereafter, on, to wit, the twenty-seventh day of February, A. D. 1874, the said defendant, as public administrator in and for the said county of Pima, territory aforesaid, duly petitioned the probate court in and for the said county of Pima for letters

of administration upon the estate of the said George M. Newsome, deceased; that thereafter, on, to wit, the twenty-fourth day of March, A. D. 1874, the said probate court, by an order duly entered and filed in the said court, granted the petition of the said defendant, and issued to him letters of administration upon the said above-named estate. Plaintiff further avers that thereafter, on, to wit, the twenty-eighth day of March, A. D. 1874, notice to creditors of the said George M. Newsome, deceased, requiring them to present to the said defendant, within ten months from the said last above-named date, with the necessary vouchers, all claims against the said estate, was duly printed and published in a weekly newspaper known and designated as the 'Arizona Citizen,' and published at the village of Tucson, county and territory aforesaid.

"Plaintiff further avers that on, to wit, the eighteenth day of December, A. D. 1873, at the town and county of Yuma, and territory of Arizona, he, the said plaintiff, and the said George M. Newsome, in his life-time, entered into a certain compact and agreement; said compact and agreement being hereto annexed, marked 'Exhibit A,' and made a part of this complaint, wherein the said George M. Newsome of the one part, and the said plaintiff of the other part, covenanted and agreed, one with the other, that upon the decease and death of either of the said parties to the said compact and agreement, then that all goods, chattels, and property, both individual and partnership, of whatever character, of which either of the said parties was seised at the time of his death should fall to and vest exclusively in the survivor, upon the said survivor paying all of the debts of the deceased party.

"The plaintiff further avers that the said George M. Newsome died on or about the twenty-first day of February, A. D. 1874, and that the said plaintiff is now the survivor as mentioned in said compact and agreement, and legally entitled to the possession and ownership of all the property of which the said George M. Newsome died seised. Said property consists of and is described as follows, viz.: two diamond rings, one plain gold ring, one large diamond breastpin, and one pair of diamond sleeve-buttons. Plaintiff avers that the above-described property is of great value; also the interest of the said George M. Newsome in the unsettled

business of the partnership formerly existing between the deceased and the said plaintiff, which is of the value of fifteen hundred dollars; that all of the above mentioned and described property, with the exception of the said partnership interest, above named, is now in the hands of the said defendant as administrator of the estate of the said George M. Newsome, deceased. Plaintiff further avers, that upon the said above last-named day the said defendant, as such administrator, rejected the said compact and agreement by his written indorsement of rejection on the back of the same, as will more fully appear by reference to the 'Exhibit A' hereunto annexed.

"And plaintiff further avers, and shows as a ground for the equitable interposition of this court, that the real and intrinsic value of the said property in question and above described, with the exception of the said partnership interest, is unknown to the said plaintiff, nor can such real and intrinsic value be ascertained except by and through the most experienced lapidaries, and that the said plaintiff is informed and verily believes that there are no such experienced lapidaries within the jurisdiction of this court; that if this court should refuse to equitably interfere between the said plaintiff and the said defendant, the said plaintiff could not be compensated in damages, for the reason such damages could not with any certainty be ascertained.

"And as a further ground for the equitable relief sought for in the complaint, plaintiff avers that the property in question and above described, with the exception of said partnership interest, is to him of a value altogether beyond their price, or actual money worth, a *pretium affectionis* on account of the bonds of friendship which united him to the said George M. Newsome; that if the said property were sold or departed from the possession and ownership of the said plaintiff, money or damages could not compensate him for the loss of said property. Plaintiff further avers that he has at all times been ready and willing, and is now ready and willing, to perform all of the conditions imposed upon him by the terms of the said compact and agreement hereunto annexed, to wit, the payment of all of the debts of said partnership heretofore mentioned, and the individual debts of the said George M. Newsome, and that he has at

divers times notified and informed the said defendant, as administrator of the said estate, of such readiness and willingness on his part to perform the said condition; and now the said plaintiff comes into court and says that he is now ready and willing to perform the said condition in any manner or form as this court shall deem fit and proper in the premises."

The complaint is verified in the usual form.

"EXHIBIT A.

"This agreement, made the eighteenth day of December, A. D. 1873, between George M. Newsome and Rufus E. Eldred (*sic*), witnesseth: that the parties hereto have been and are now full partners in all their business of whatsoever kind that has been contracted by them or either of them; that it is agreed now that in the case of death of either partner, the surviving partner shall settle the business of the partnership, and that after paying all the just debts of said partnership, and the debts of the deceased partner, that all the property of every kind, money or stocks, remaining, shall belong to the surviving partner, for his sole use and benefit, without any process of law whatsoever, accounting only to the creditors of the firm, and the creditors of the deceased partner, and to no one else without exception.

"This agreement has always been fully understood between the parties hereto, and after careful consideration is now fully understood, and we now bind ourselves, and all persons connected to or with us, firmly by this agreement.

"G. M. NEWSOME. [Seal.]

"R. E. ELDRED. [Seal.]

"Signed in presence of

"H. N. ALEXANDER."

Then next appears the following affidavit:

"Territory of Arizona, county of Pima, ss.

"Rufus E. Eldred (*sic*), being first duly sworn, deposes and says the within claim is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the said affiant, the claimant.

"R. E. ELDRED.

"Subscribed and sworn to," etc.

Then comes the following indorsement of rejection:

"Rufus E. Eldred having submitted to me this article of agreement as a claim against the estate of George M. Newsome, deceased, the same is hereby disallowed this fifth day of May, A. D. 1874.

SOLOMON WARNER,

"Administrator of the estate of George
M. Newsome, deceased."

Then follows a copy of the summons; next, a demurrer that the complaint does not state facts sufficient to constitute a cause of action by McCaffry for defendant. Upon the hearing in the court below, the demurrer was sustained. Plaintiff appealed.

McCarty and Clark and C. W. C. Rowell, for plaintiff and appellant, claiming the instrument to be a contract, cited *Logan v. Wienhold*, 1 Story's Eq., sec. 786; *Du Beil v. Thompson*, 43 Eng. Ch. 468; *Beckley v. Newland*, as referred to in 1 Story's Eq. 343.

McCaffry, for defendant and respondent. It is not a will. 4 Kent, 633; *Schumaker v. Schmidt*, 4 Am. Rep. 135; *Brewer v. Baxter*, 5 Id. 530; Redf. on Wills, c. 2, sec. 2; *Martindale v. Warner*, 15 Pa. St. 479. It is not a claim against the estate. Prob. Laws, A. T.; *Fallon v. Butler*, 21 Cal. 31. Plaintiff should have gone to probate court first. Prob. Laws, A. T.; 10 Cal. 500; Comp. Laws, 376, sec. 13, 14. It is not a valid will. Stat., Wills; Comp. Laws, 250; *Alter's Appeal*, 5 Am. Rep. 434.

On the hearing in this court it was adjudged by the majority of the court that the judgment below, sustaining the demurrer, be reversed. I can not concur, and I submit the following reasons for my dissent. I will first, as a preliminary matter, consider whether the question of jurisdiction has been raised. Section 144 of the New York code prescribes the first and sixth grounds for demurrer as follows:

1. That the court has no jurisdiction of the person of the defendant or of the subject of the action.

6. That the complaint does not state facts sufficient to constitute a cause of action. New York Code, sec. 144.

Section 40 of our civil practice act is the same, and is of course taken subject to such judicial construction as was had in New York prior to our adoption of it; therefore, whatever

objection could have been taken in New York under a demurrer for the sixth cause, at the time our statute was adopted, must also be allowed here. In New York it was held under that statute, before our adoption of it, that although the usual form of excepting to the jurisdiction of the court is by special demurrer under the first head, *nevertheless* this is not necessarily the form for the case of an objection to what is called the equitable jurisdiction, which depends on remedy at law. Thus, the objection that the facts stated in the complaint do not present a proper case for the exercise of the equitable power of the court to remove a cloud from plaintiff's title, is not an objection to the jurisdiction of the court, which must be taken specifically under section 144, subdivision 1, of the code, but it may be taken by demurrer under subdivision 6 of that section, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Hotchkiss v. Elting*, 36 Barb. 38, as quoted in 2 Abb. Pr. & Pl., p. 5, note x.

The complaint in this case prayed for equitable relief alone, and showed that no other relief was possible, and expressly alleged that there was no adequate remedy at law. Under that showing in the complaint, the demurrer in this case raised the question of jurisdiction. *Hotchkiss v. Elting*, 36 Barb. 38. Besides this, section 45 of our civil practice act, following the sections assigning objections which may be taken by demurrer or answer, says: "If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, *excepting only* the objection to the *jurisdiction* of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The question of jurisdiction is never waived. It can be raised at any time. And there is nothing in our statute limiting a party to any particular way of raising such an objection, or any particular time when he shall do it. It would appear, then, that at any time such an objection is brought to the notice of the court in any way it must be entertained, and if found good, it must be sustained; at least, I think there can be no doubt that such is the case where there is an inherent, insuperable, incurable bar to the jurisdiction. I will not say, if there was a potential jurisdiction,

but that, by a technical omission of the service of some notice or something of that sort, it had not been perfected, some formal motion might not be necessary in order to give the party in default a chance to explain or possibly remedy the defect; but where it is found that it is not within the power of the court, by any means known to the law, to acquire jurisdiction, then I do not consider that it is necessary even for counsel in the case to suggest the objection. It would be the duty of the court, I think, on suggestion of an *amicus curiæ*, or of its own motion, to dismiss the case, because if objection of counsel was necessary to raise the point, then jurisdiction could be forced upon the court by consent of counsel or of parties, and this, it is well settled, can not be done—jurisdiction can not be conferred by consent. Therefore I think the doctrine in *Hotchkiss v. Elting*, 36 Barb. 38, eminently sound, that a formal demurrer that the complaint does not state sufficient facts to constitute a cause of action very well raises the question whether it is a case of which the court can by any possibility have jurisdiction.

The complaint in this case was a bill in equity for specific performance, but it contains a certain statement of facts. If those facts, as stated, would give the plaintiff a standing in court on any other basis than the one he supposed he occupied, it may be urged that he would have been entitled to the proper relief, although such relief might have been at law instead of in equity. I shall therefore consider this complaint in every way in which it seems possible to me that it might be made the ground for relief of any kind, either at law or in equity. I shall consider whether the demand made can be regarded as upon a claim against the estate in the sense of the probate act, or as upon a contract, and if it seems the instrument has reference to neither of these things, I shall endeavor to see what kind of a document it is, judged by the accepted canons of judicial construction, and if found to be anything at all, whether in such case the court could grant any relief upon it.

1. Is this a claim against the estate in the sense of the probate act? To determine whether the claim made by plaintiff is such a claim as the statute contemplated, we must examine, first, what kind of a claim it is which plaintiff puts forward, and then see whether it falls within the class de-

scribed in the statute. The plaintiff claims that by virtue of a certain instrument in writing, which he calls a contract between him and the deceased, he has practically become the sole and exclusive devisee of the deceased, with the right to take the whole estate and administer upon it himself, paying all just claims against the estate, and retaining the residue thereof to his own exclusive use and benefit. The demand he made upon the administrator was that the whole estate of the deceased, then in the hands of the administrator, be delivered to him. This the administrator refused to do. Whereupon plaintiff brought this action, praying that the court order the administrator to comply with his demand. Such was the claim which the plaintiff presented to the administrator.

Now let us see what kind of claims the statute says may be presented to the administrator, and which, upon his rejection thereof, the district court may examine and order to be paid in due course of administration, and let us consider, as we go along, whether in these sections the word "claim" does or does not mean a *money demand* and what a *creditor* may present. Section 128 of our probate act says that "every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper published in the county, etc., a notice to the *creditors* of the deceased, requiring all persons having *claims against the deceased* to exhibit them with the necessary vouchers," etc.

Section 130: "If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever, provided, if it be not then *due*, or if it be contingent, it may be presented within ten months after it shall become due or absolute," etc.

Section 131: "Every claim presented to the executor or administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no *payments* have been made thereon, and that there are no offsets to the same, to the knowledge of the claimant or other affiant. The amount of interest shall be computed and included in the statement of the claim, and the rate of interest determined," etc.

Section 133: "*Every claim* which has been allowed by the executor or administrator, and approved by the probate judge,

shall, within thirty days thereafter, be filed in the probate court and be ranked among the *acknowledged debts* of the estate, to be *paid in due course of administration*," etc.

Section 134: "When a claim is rejected, either by the executor or administrator or the probate judge, the holder shall bring suit in the proper court against the executor or administrator, within three months after the date of its rejection if it be then due, or within three months after it becomes due, otherwise the claim shall be forever barred."

Section 140: "The effect of any judgment rendered against any executor or administrator upon any claim for money against the estate of his testator or intestate, shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, *and the judgment shall be*, that the executor or administrator *pay in due course of administration the amount* ascertained to be due. A certified transcript of the judgment shall be filed in the probate court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

Section 147: "At the same term at which he is required to return his inventory, the executor or administrator shall also return a statement of all *claims* against the estate which shall have been presented to him. * * * In all such statements he shall designate the names of the creditors, the nature of each claim, when it became *due* or will become due, and whether it was allowed or rejected by him."

These sections speak of creditors, of amounts being due, payments thereon, offsets to the same, computations of interest, the rate of interest, and the payment of such claims in due course of administration.

To my mind, it seems beyond question, that in all these sections the legislature had in view one class of claims only, namely, money demands—demands of a certain sum of money, or a sum which by examination could be made certain, a claim which would be fully met by a money judgment, or by an order to procure and pay a certain sum of money, and not prayers for equitable relief, demands for specific performance, or claims for an entire estate.

There seems to be no necessity for trying to give the pre-

ceding sections a wider range than was manifestly intended by their wording, namely, to provide for the adjustment of money demands, because the act makes full provision by means of other sections for the adjustment of every other kind of demand which can possibly arise in the settlement of an estate. There is no trouble in discovering what shall be done with different demands under the probate act. In its three hundred and six sections, copied mainly from the California law, and profiting by all the experience had in that and other states, all is provided for in a clear, orderly, and comprehensive manner. Every possible claim or demand or right connected with the settlement of an estate receives full consideration, and its appropriate section or sections prescribe how it shall be presented, and when it shall be determined. Some it sends to the administrator, some to the justices' court, some to the probate court, and some to the district court; each in its separate course, but all in harmony with established principles of jurisprudence. If these sections as to claims against the estate mean other claims than for money demands, then why such care in providing other sections for so many other kinds of demands, on which the proceeding is entirely different from that of going to the administrator with the demand? In the broad, unlimited sense of the word "claim," a person has a claim against the estate when the testator or intestate has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of such person; so, if he has committed trespass upon the real estate of such person; so, where the deceased was bound by contract in writing to convey real estate to another; so, where he had made any contract with another on which he was liable during his life; so, where a person is entitled to the recovery or possession of real or personal property; yet all these claims are provided for in special sections in a portion of the probate act entirely distinct and apart from the portion concerning what are technically called "claims against the estate" which are to be presented to the administrator, which special sections give a right of action, in the proper court, to a claimant of that class; but all of this would be useless and senseless if the term "claim against the estate to be presented to the administrator" covered all claims, even those other than

money demands. Suppose a man claimed a pair of horses or twenty cows in the possession of the administrator, the administrator can take no action upon such a claim. The power to reject implies the power to judge and allow. When the administrator allows a claim, the effect is merely that it is set down as one of the just debts of the estate, to be paid in due course of administration, and the time for payment can hardly be less than one year, and may be several years; and how can he pay horses, or cows, or diamonds? but the owner is entitled to his horses, or his cows, or his diamonds immediately, if he can show title, and so he is given a right of action for them at once, but that right of action is not as upon a "claim against the estate," in the technical sense of the probate act.

The foregoing sections are substantially a copy of the California probate law. In that state, the question as to what is meant by the word "claim," in sections similar to those above quoted, has frequently arisen.

In *Fallon v. Butler*, 21 Cal. 24, the subject received careful consideration; Mr. Justice Field, who delivered the opinion, stating that titles to property amounting in value to millions of dollars hung upon the meaning given to the word "claim" in the probate act. After a full review of sections similar to those above quoted, the judgment of the court was that: "Whatever signification there may be attached to the term 'claim' standing by itself, it is evident that in the probate act it only has reference to such debts or demands against the decedent as might have been enforced against him in his life-time by personal actions for the recovery of money, and upon which only a money judgment could have been rendered."

Under this view of the meaning of the term "claim" in the probate act, the court went so far as to declare in that case, that even a mortgage lien was not a claim against the estate in the sense that it should be presented to the administrator for his action thereon, overruling two former decisions of the court on that point.

The same question has arisen in New York, under a law similar to ours, and thereupon the language of the court was: "The statute contemplates an ordinary debt for which the deceased was liable in his life-time, upon a prom-

ise, express or implied; a debt which may be supported by the oath of the creditor, which is justly due, which may be the subject of an offset, and which was cognizable in the common-law courts." *Sands v. Craft*, 10 Abb. Pr. 216; S. C., 18 How. Pr. 438, as quoted in McClellan's Probate Pr. 234.

But the demand in this case could never have been enforced against the deceased in his life-time, and not even now could a judgment ordering the payment of any certain sum of money be rendered thereon; wherefore, I consider it clear that this demand is not a claim against the estate which should have been presented to the administrator, and that, therefore, the plaintiff was not benefited in any way because he did so present the claim, and the case must be considered as if no such presentation was ever had, except in so far as the recitals in the complaint as to presentation show that plaintiff had notice of all the proceedings in the probate court connected with this estate.

It would have been utterly impossible for the court below to have proceeded on this demand, as upon a claim against the estate in the sense of the probate act, because in such case the judgment is compelled, by section 140 of the probate law, to take a certain specific form, viz.: "And the judgment shall be that the executor or administrator pay, in due course of administration, *the amount ascertained to be due.*"

This matter being on demurrer, the statements in the complaint are to be taken as true, and the complaint states it is impossible to ascertain the amount in money which will be a satisfaction of plaintiff's demand, that money can not compensate him, that he is praying for certain mementos of a deceased friend which have for him a *pretium affectionis* far beyond their money value, even if that value could be ascertained; so it is clear that no judgment, as upon a "claim against the estate," could have been rendered in this case, and therefore, the complaint failed to make a case as on that ground.

II. Is this instrument a contract on which specific performance will lie? Specific performance will not lie on this instrument, as a contract, because: 1. As a contract, the right of action is barred thereon by the probate law; 2. As a contract, the instrument is a violation of the statute of

wills; 3. As a contract, it is against public policy, and therefore void.

1. As a contract, the right of action on this instrument is barred by the following section of our probate law: "Sec. 195. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators *in all cases in which the same might have been maintained by or against their respective testators or intestates.*" Laws, 1873, p. 143.

Could any action have been maintained upon this instrument as upon a contract during the life of the deceased? Clearly not, for by the terms of the instrument itself no right accrued, or could accrue to the plaintiff, until the death of the other party. The legislature has expressly declared that no action can be had upon it *as a contract* after his death.

2. As a contract, the instrument is in violation of the statute of wills. Section 4 of our statute of wills reads as follows: "Sec. 4. Every person of full age and sound mind may, *by his last will and testament* in writing, bequeath and dispose of all his personal estate remaining at his decease, and all his rights thereto and interest therein, and all such estate *not disposed of by the will* 'shall be administered as intestate estate.'" Comp. Laws, 1871, p. 250. There is a similar section as to real estate, and the instrument in this case undertakes to dispose of all property of every kind remaining at the death of either party after payment of debts. Here is a permission to dispose of personal property by will, coupled with the positive declaration that if not disposed of by will it must be administered upon as intestate estate, thus cutting off the right to dispose of it by contract.

Counsel for plaintiff urge in their brief, filed in this case, the following proposition: "A person may dispose of his property in any way or manner he desires. He may, if not laboring under any legal disability, enter into any contract for the disposal of his property, either before or after his death, as he wishes. The law does not and can not restrain him in this particular, unless it be done in subversion or in fraud of the rights of others. A person desirous of dis-

posing of his property after death may make a will, but most certainly the law does not limit him to that particular form or method of procedure." Folio 10 of plaintiff's brief.

I think it is quite clear from the reading of section 4 of our statute of wills, that the law does limit him to the particular form or method of procedure known as making a will, and debars him from disposing of his property by a contract. That our legislature has the power to make such a statute, I will consider in another part of this opinion.

The supreme court of Iowa says: "A contract made in violation of a statute * * * is void, and can not be enforced by action. This principle is sustained by a great number of authorities. Besides those just cited, we refer to a few others: *Pennington v. Townsend*, 7 Wend. 276; *Robeson v. French*, 12 Met. 25; *Lyon v. Strong*, 6 Vt. 219; *Gregg v. Wyman*, 4 Cush. 322; *Davis v. Bronson*, 6 Iowa, 410; *Wheeler v. Russell*, 17 Mass. 258. This last is a leading case upon this subject, in which Parker, C. J., says: 'No principle of law is better settled than that no action will be maintained upon a contract made in violation of the statute.'" *Pike v. King*, 16 Iowa, 52. And see *post*, in this opinion, the language of the court in *Habergham v. Vincent*, that a man is bound to follow the forms prescribed by law.

3. As a contract, the instrument is in violation of our public policy. It is the policy of our government, as well as of all civilized governments, to foster and uphold the family relation, the basis of all society. The family is fostered and protected by having the right to succeed to the estate of the ancestor. The right of succession is a part of our public policy. The statute of wills, so far as it allows an ancestor to name his heirs to the exclusion of his natural heirs, is in derogation of that right. The privilege which it gives is a privilege to disinherit the heir. It is a privilege very carefully guarded by the checks and limitations in the statute itself, requiring the act to be done in writing, by a person of full age, of sound mind, and in the presence of two witnesses, who shall attest the instrument at the time. The act of disinheritance in this case is against the public policy of the territory, and would be void independent of the statute of wills, because not sanctioned by any law.

The territory is a possible heir itself to all estates. It

comes next in succession after the failure of all natural heirs, and takes the property of an intestate as an escheated estate. It has a right to say that a stranger in blood shall not succeed to an estate to the exclusion of the natural and legal heirs, except in accordance with express provisions of law. It has named the conditions under which alone he may succeed. There is no provision of law allowing him to succeed under a simple contract, and such a contract is therefore void as against the public policy of this territory. Plaintiff has cited only three authorities in support of his view that the instrument herein is a contract on which a decree for specific performance should be given, viz.: *Logan v. Wienhold*, *Du Biel v. Thompson* and *Beckley v. Newland*, but neither of them seems to me to have any bearing on the case at bar. *Logan v. Wienholt*, 7 Bligh, 53, cited in 1 Story's Eq. Jur., sec. 786, was a covenant by which a person bound himself to give, by his will, as much to A. as he gave to B., and it seems that it was held he was bound to do so. The case is expressly stated by Story to be cited to show how far courts of equity will go to enforce specific performance against parties and *privies* in estate. The case itself is not accessible to me. So many of the English cases of this nature seem to turn on contracts in marriage settlements which are held to pass an absolute present right and to constitute an irrevocable charge on the estate, that the circumstances of the case may be important. B. may have been privy to the contract, consenting to it for a good consideration, but however that may be, it seems that in England that case is not considered as governing a contract like the one at bar, for in the recent case of *Ryan v. Daniel*, hereinafter cited, specific performance upon an instrument similar to this was refused.

Du Biel v. Thompson was as follows: It is an English case. Mr. Thompson was a person possessed of considerable wealth, and had a marriageable daughter. Du Biel was a single gentleman, having the title of baron. Mr. Thompson entered into written agreement with the baron that if the latter would marry his daughter, thus making her a baroness, he would pay down the sum of £10,000 sterling, and would also leave a further sum of £10,000 in his will to be settled on his daughter and her children. The baron, in addition

to marrying the young lady, was also bound to settle £500 a year upon her during her life. The baron performed his part of the agreement. He took Miss Thompson to wife, and settled £500 a year on her for life, secured out of his Mecklenburg estate. Mr. Thompson performed a part of his agreement. He paid down the £10,000, but he omitted to charge his estate in his will with the other £10,000, as he bound himself to do. Du Biel, the plaintiff, son of the baron, his father and mother being dead, filed a bill praying that the executor of Mr. Thompson's estate should be compelled to pay the remaining £10,000, according to the agreement, and it was so ordered, and that is all there is in the case. I fail to see any material analogy between that case and the one at bar. *Beckley v. Newland*, 2 P. Wms. 182, cited in Story's Eq. Jur., the only other authority adduced by plaintiff, is also irrelevant. Fry on Specific Performances, page 496, gives the gist of this case as follows: "In *Beckley v. Newland*, the plaintiff and defendant had married two sisters who were the presumptive heiresses of Mr. Furgis, a very rich man, who had made and revoked several wills, and ultimately made one leaving a great estate to defendant, and only a small one to the plaintiff. Previously to the execution of the will, the plaintiff and the defendant had entered into an agreement for the equal division between them of what should be left to each of them, and this agreement was upheld and specifically enforced by Lord Macclesfield, who said that the agreement was 'not disappointing the intent of the testator, for he did not design to put it out of the devisee's power to dispose of the estate after it should come to him; but on the contrary, when the testator gave to either of them, he by implication gave to that person a power to dispose of the said estate when it should come to him.'" *Beckley v. Newland* was then a contract between two persons to share equally an estate if it came to them, or either of them. The contract in that case was one which could be, and was, enforced during the life of the parties making it, and, it might be argued, would not be obnoxious to the section of our probate act before cited, which bars all actions on contracts against an executor or administrator except such as could have been enforced against the deceased during his life-time,

although even then, if the plaintiff waited until the decease of the other party, he might be met by the case of *Morse v. Faulkner*, 3 Sess. Cas. 433, note, to the effect that a liability on such a contract is purely personal, and dies with the person. See Fry on Spec. Perf. 499, 2d Am. ed. But such a contract has been held illegal in this country, even during the life-time of both parties.

In *Mercier v. Mercier*, 50 Ga. 546, "plaintiff agreed with defendant, her brother, who proposed to contract a marriage of which their father disapproved, threatening if it was contracted to leave all his property to plaintiff, that she would divide the property if left to her, equally with defendant, who agreed to do the same if the property should be left to him. Defendant was married accordingly, and his father afterwards died and left *him* all his property. Held, that the agreement between plaintiff and defendant was against public policy, and that a bill would not lie for specific performance of it," as quoted in Am. Law Rev., Oct. 1875, p. 137.

I do not consider either of these cases in point. I have cited *Mercier v. Mercier*, merely to place it side by side with *Beckley v. Newland*. I will now cite a case, the analogy of which to the one at bar will, I think, be evident. I refer to the recent case of *Ryan v. Daniel*, 1 You. & Coll. 60. Fry, in his Specific Performance, states the case of *Ryan v. Daniel* as follows: "In the latter case, each of two young officers in the army signed and gave to the other a document by which each charged his estate with £1,000 in favor of the other, in case the other should survive him, the consideration of each of these documents being *the other* of them. Many years subsequently a correspondence passed between these officers with a view to a rescission of the transaction, but that intention was never carried into effect. The court held, that, looking at the circumstances of the transaction, the age and condition of the parties, and their subsequent correspondence, there was no equitable claim which the court could enforce; but it retained the bill for twelve months, with liberty to bring an action to establish, if they could, a legal debt." Fry on Spec. Perf. 499, 2d Am. ed. In this last case the claim was for a certain fixed sum of money, which possibly might have been established as a money demand against the

estate to be paid in due course of administration, and the court, while denying the plaintiff equitable relief on the contract, held the case open for a year, to give him a chance to establish it as a legal debt, or what we would call a "claim," or money demand against the estate, so that if he did succeed in establishing it, the court might make the requisite order—I suppose in case the executor refused to pay it. Our system, as I have shown, is different. A claim in that sense does not, with us, come into the equity court at all, and this action is based on the assumption that the demand herein is not a claim of that kind.

The probate law and statute of wills of this territory are public acts, of which, together with the public policy of the country, courts must take judicial notice. The instrument set forth as the whole foundation of the action being void on its face as a contract, I think it appeared on the face of the complaint that there were not sufficient facts stated to constitute a cause of action, as upon a "claim" or as upon a contract. It remains to be seen whether there was any force in the instrument viewed in any other light upon which the court might have acted, and this brings me to the consideration of the question, What kind of an instrument is this which was executed by plaintiff and deceased?

In law, instruments are classed according to their legal effect, notwithstanding the parties may have considered they had a different effect, or may have given them a different name at the time of their execution. Parties may sign an instrument and call it a deed, but the courts will sometimes tell them that it is in fact a bond, or a mortgage, or a contract; or probably, to their surprise, they may be informed that it is not a deed at all, but a will.

The courts have certain legal tests for determining the character of instruments submitted to them. The test to discover whether a document is a will or not, is to inquire whether it passes a present interest, or whether it passes no interest until after the death of the maker. In the first case, it is not a will; in the second case, it is a will, no matter what may be its form. Let us look at some English authorities on the point. *Habergham v. Vincent*, 2 Ves. jun. 205; S. C., 4 Bro. C. C. 353, was argued before the high court of chancery in England in 1793, Lord Loughborough, chancellor.

In this case, a person made a will disposing of all his estate, prescribing the line of succession through a great number of possible contingencies. At a certain point in these limitations he stopped, weary, possibly, with following the line of possible succession, and declared that he reserved to himself the right to dispose by deed of the way his estate should go if the last contemplated contingency should fail. The next day, fresh for the work, he took up the tangled thread of remainders and by a *deed-poll* directed how the estate should go in the event of the failure of the last contingency provided for in the will; and soon after he died. Then, in a surprisingly short space of time, every one of the dispositions in the will failed by the death of all the heirs under the will. Then the latent power of this *deed-poll* came into play, and the question was, Should it operate as a deed or as a will? If it fully operated as a will, it would disinherit the heir at law and pass the estate to a stranger in blood. The case was argued first before Lord Thurlow, and he, the report says, "having taken a long time to consider," sent it to the king's bench in 1792. In consequence of too brief a statement of the case as sent, the court of king's bench held the deed-poll to be a deed, and incompetent to vest any estate in the parties claiming under it. The case was reargued in the high court of chancery before Lord Loughborough, and he declared that he thought the deed-poll was in fact a testamentary document, but having been decided differently in the king's bench, he did not like to decree it alone, therefore, would give another hearing, and call in two judges from that bench, that they might enlighten him in the matter. He called Justices Buller and Wilson. The case was then reargued before the lord chancellor and those two judges, three counsel being heard on each side, one of whom was the attorney general. The lord chancellor complimented the counsel on their efforts, declaring that the question had been argued with "great industry and ability." I mention all this to show what thorough consideration was given to the question as to how a document may be testamentary in its nature, though it be not in the form of a will, nor intended as a will, but really intended as a deed.

It was on this final hearing in the high court of chancery unanimously decided that the instrument was not a deed,

but a will; that it would not pass any of the freehold estates, because for that purpose it was defective as a will, it not having sufficient witnesses, but that it was sufficiently attested to pass the *copy-hold* estate of the testator, one witness being sufficient for that purpose; that therefore the freehold estate should go to the heir at law of the testator, as not having been otherwise devised, but that the copy-hold should go to the heir of the surviving trustee.

Mr. Justice Buller, in delivering his opinion, said: "The first point I shall consider, is whether the last instrument is testamentary or not. * * * It was argued for plaintiff that the testator did not intend to make a will when he executed the deed, and therefore it can not operate as a will. Whether the testator would have called this a will or a deed is one question; whether it shall operate in law as a deed or a will is a distinct question, and that is now to be considered. That is to be governed by the provisions in the instrument. A deed must take effect upon its execution, or not at all. It is not necessary to convey an immediate interest, in possession, but it must take effect as passing that interest executed; but a will is quite the reverse. It can only operate after death, and upon this instrument it is clear the testator had no idea that this paper would have any effect until a distant period long after his death. * * * When this case was argued there [in the king's bench], no one of the cases quoted here by the *attorney general* was mentioned or alluded to. I freely confess they did not occur to me. But those cases have established that an instrument in any form, whether a deed-poll or an indenture, if the obvious purpose is not to take effect till after the death of the person making it, shall operate as a will. The cases for that are both in law and equity, and in one of them there were express words of immediate grant and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after death, it was considered as a will. Therefore, this last instrument must be considered as a codicil, and I shall call it so in what I shall say upon it. The next question is what effect this codicil has upon the freehold. Upon that point I agree with my brother Wilson, that it is void for want of three witnesses

[but as to the copy-holds, Buller, J., says, "the others concurring that one witness, was sufficient"].

"The lord chancellor, in giving his opinion, concurred in the view that the deed-poll was in law a testamentary document, and said: 'Thirdly, there is no difference between law and equity in determining upon the effect of a testamentary act, and this instrument can not pass the freehold estate contrary to the provisions of a public law making that act void [that is, the law for wills requiring three witnesses for such a will]. The observation made by Justice Wilson is unanswerable, that it is not a personal privilege; that no man can reserve a power to act against the forms the law has imposed. Therefore, if it is to pass by a testamentary act, that must have all the requisite solemnities the law has directed.' * * *

"Mr. Justice Wilson declared: 'By the common law a man could not devise land. Then came the statute permitting him to do so by an instrument properly signed. Then, lest testators should be imposed upon, these guards were created by the statute of frauds, and that insists that a will of land shall either be executed in the manner pointed out, or be void [in this territory wills as to realty and personalty are on the same footing]. This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to that statute, and the testator can not say he will make a will without the requisites prescribed, either not thinking he will be imposed upon or not caring about it. The law will not suffer that, but requires, in all cases, that these ceremonies, which might be considered as circumstances only if the act had not said otherwise, shall be essential, and be observed in making every will.'" *Habergham v. Vincent*, 2 Ves. jun. 205; S. C., 4 Bro. C. C. 353.

I have quoted language from the above case on points other than construction of instruments, namely, as to the binding force of the statute of wills, as cutting off equitable relief in cases not within the statute, to which I will refer in a subsequent portion of this opinion.

To continue with the English authorities. Jarman states: "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched

in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, disclose the intention of the maker respecting the posthumous destination of his property, and if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded. Thus a deed-poll, or even an *agreement* or other instrument between parties, has repeatedly been held to have a testamentary operation. * * * The ecclesiastical judges (before whom, of course, questions of this kind are most frequently agitated) act fully up to the principle which regards as testamentary *any instrument* that is designed *not to take effect until the maker's decease*, though assuming the form of a disposition *inter vivos*, and more especially if it be incapable of operation in the intended form, and accordingly, in *repeated instances*, the prerogative court has granted probate of such irregular documents as the assignment of a bond by indorsement, receipts for stock, and bills indorsed, a letter, marriage articles, and promissory notes and notes payable by executors, in order to avoid the legacy duty." 1 Jarm. on Wills, 13-20 (my italics); also *unsigned* drafts of bonds, Id. 20; also a *deed* conveying real estate, which contained a clause that *on the death of the survivor of two cestuis que trust*, trustees should "pay over all the property to different persons," Id. 20; and many other cases similar in principle there cited. Of course, our statute of wills would prevent probate here of such instruments; that is, it would determine that as wills, or testamentary documents, they would be bad, not that they would be good for some other purpose. To make them available for other purposes, it would be necessary to show that they were not testamentary in their nature, for it does not follow that any given instrument must be of some force for some purpose; it may easily be of no force for any purpose.

Dufour v. Pereira, 1 Dick. 419, cited in *Lord Walpole v. Lord Orford*, 3 Ves. 416, was a case where two persons signed an agreement before a notary public, providing for the disposition of their property after the death of either, and also after the death of the survivor. The parties were man and wife, but they were foreigners, and in their own

country some of the property was the separate property of the wife, but the property consisting of personalty, and being in their possession in England, was, by law there, the property of the husband. To save their rights, they signed an agreement declaring with great minuteness what should be done after the death of either and of both. The husband died first, but the instrument was not treated, as to him, as a contract. It was probated as his will. By the terms of the instrument, the wife was to have the enjoyment during life, and limited to that, of all the specific interests. She had a limited power of disposing of part of that property, but all she had was upon condition that she should dispose of it together with such other property as she might acquire after death upon the "*dispositions of that will.*" Such is the language of the opinion. By "disposition of that will" is evidently meant the terms of the agreement, which agreement was held to be the *will* of the party who first died. The wife on her death undertook to dispose of the property received by her under this will, and other property she had afterwards acquired, in a manner different from the terms imposed by the agreement or will; and then came a bill for specific performance, and Lord Camden held that by signing that instrument and taking the benefit of it, she had entered into an agreement to take the property devised to her, subject to the conditions of the instrument under which she took, one of which was that if she took that property she should stand by her agreement that on the death it should go as directed in the agreement, together with whatever property she might acquire after her husband's death. That, I take it, is the extent to which the instrument in *Dufour v. Pereira* was held to be a contract. It was construed to be the will of the party dying first, but the terms of it binding as a contract upon the survivor who had chosen to accept its conditions. In the case at bar, the survivor is named as legatee, conditioned, however, that he will pay the debts of the estate. He may rightfully claim these diamonds, which he alleges are of such great value, and which he declares have a *pretium affectionis* for him which can not be estimated in money, if he can get the instrument probated as a will, and will comply with the conditions. The instrument is a contract, as to this plaintiff, to

this extent, that he has agreed that he shall have no right to the diamonds unless he pays all the debts of the deceased.

In the case of *Lord Walpole v. Lord Orford*, 3 Ves. 402, from which the above is cited, an attempt was made to prove an agreement for a mutual will. The agreement was not proved, but the chancellor declared, that even if it were proved, unless it were shown to be revocable it would not be enforced. It follows from that, that if an instrument setting forth such an agreement be not revocable, it can not be enforced. If it be revocable, then, being a direction for the disposition of property after death, not to take effect until after death, it is ambulatory in its nature, and is a testamentary document.

Let us now look at the American authorities. "A will may be defined to be a legal revocable disposition of one's property, to take effect from his death." *Langdon v. Astor*, 16 N. Y. 9, 49, as quoted in O'Hara on Construction of Wills, 4. "Such an instrument may be couched in any form or language, provided that its whole operation is postponed to the death of the grantor. In one case there were both a consideration for the grant and words of immediate transfer, yet the instrument was held to be testamentary." *Allison's Ex'rs v. Allison*, 4 Hawks, 141, cited by O'Hara, p. 4. "In the United States, as well as in England, the testamentary character of a document depends on its substance, and not on its form, except so far as that depends on the statute." *Id.*, referring to *Carle v. Underhill*, 3 Bradf. 101, and *In the Matter of Easton's Will*, 6 Paige, 186. "A last will and testament may be defined as the disposition of one's property, to take effect after death." 1 Redf. on Wills, c. 2, sec. 1; *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Id. 338.

When the payee of a promissory note made special indorsement to the effect that if he were not living at the time of its payment he ordered the contents paid to a person named, and died before the note was paid, the indorsement was held to be of a testamentary character, and entitled to probate as a will. 1 Redf. on Wills, 169, referring to *Hunt v. Hunt*, 4 N. H. 434; S. C., 17 Am. Dec. 438. "A deed which in terms was not to operate until after the decease of the grantor has been held testamentary, and as such

admitted to probate." *Id.*, referring to *Gage v. Gage*, 12 N. H. 371; *Ingram v. Porter*, 4 McCord, 198; *Milledge v. Lamar*, 4 Desau. 617. "Although an instrument is in form a deed, if it appears on its face that it was only intended to have effect after the death of the maker, it will be regarded as testamentary." *Sartor v. Sartor*, 39 Miss. 760, as cited in 1 Redf. on Wills, 174, note 27. "We are not aware that any essential difference exists in regard to the construction of wills between courts of law and courts of equity." 1 Redf. on Wills, 500.

The question as to whether an instrument in the form of an agreement was testamentary in its nature or not, was considered in the supreme court of Iowa, and it was held that the instrument was testamentary. The opinion states that the rule of construction by which to determine whether the instrument is a will or a contract is: "If the instrument passes a *present interest*, although the right to its possession or enjoyment may not accrue until some future time, it is a *deed* or a *contract*, but if the instrument does not pass an interest or right till the *death of the maker*, it is a *will* or *testamentary paper*." (The italics are as in the opinion.) *Burlington University v. Barrett*, 22 Iowa, 60. Certainly the deceased in the case at bar did not intend to pass any interest in his property until after his death, for he did not covenant to stand seised of any property at all, but simply declared that whatever he might have at his death should go to the plaintiff.

In construing instruments, courts look at the intention of the maker, but in the matter of disposing of property the intention which they inquire into is, not what kind of an instrument he intended to execute, but what kind of an estate he intended to create. The subject-matter in the mind of the maker is, not what the instrument may be called in law, but what he is doing with the property. A man may very well know whether, in giving away a portion or the whole of his property, he wants to give it out and out, at the time, or whether he intends the gift shall not take effect until after his death, though he may not know or care what legal terms courts would use to designate the instrument he executes. The intention as to the property is the vital thing, and that is the intention the courts try to get at; for an instrument

is not the will of the maker unless it is correctly interpreted. His real will is not the paper itself, nor the writing which is upon it. The writing is merely intended as the expression of his will, intention, or desire. It may not correctly express that desire or thought; in fact, correctly expressing it, if properly understood, the language may be misunderstood and then his real will is not executed at all. Therefore, the question the courts try to solve is, What did the maker really wish to do with his property? This distinction was clear in the mind of the supreme court of Georgia when it declared: "In determining whether an instrument be a deed or a will, the court will not consider what the maker believed it to be, but what in point of law it is. The intention of the maker as to the *character of the estate conveyed* is the criterion by which the court will determine whether a given paper is a deed or a will, and if the intention gathered from the whole paper is that the estate is not to pass *until his death*, it is a will and not a deed." *Brewer v. Baxter*, 41 Ga. 212; referring also to *Hester v. Young*, 2 Id. 31.

I think I have cited enough to show that under both the English and American authorities any instrument, no matter what may be its form, which undertakes to dispose of property, the disposition not to take effect till after the death of the maker, no interest of any kind passing until after his death, is a testamentary document, to be treated entirely as such, so far as it relates to such property; and that the rules for constructing such an instrument are the same in equity as in law: that the character of the instrument once established as a will, it must then be treated throughout, so far as it relates to such property, as a will, to have force as a will so far as the disposition of that property is concerned, or else have no force at all in that respect.

In *Burlington University v. Barrett*, 22 Iowa, 72, the court said that counsel contending that the instrument was a contract cited twelve cases in support of that proposition. None of these cases cited are accessible to me; but I find in looking at the brief of counsel citing them, that five of them are cited in support of the proposition that "an instrument conveying personal property absolutely but retaining possession and control thereof during the life of the grantor is valid." In reply to those cases, it may be answered: 1. That

the instrument in this case does not pretend to convey any personal property absolutely; 2. That even if it did, such mode of disposing of personal property after death is forbidden in this territory by statute, which declares it can be done only by will, executed with the same formalities as a will for realty. Of the remaining seven cases, three of them are cited in support of the proposition that "an obligation to be performed or to pay money after the death of the obligor is a valid contract, and not a testamentary writing."

In the instrument at bar, there is no obligation to pay money after death, and if it be claimed that it imposes an obligation to be performed after death, and is thereby a contract in the sense of those cases, it may be answered, that if the obligation was not to be performed until after death, no action could have been had on such a contract during the life of the party; and however it may be elsewhere, in this territory the legislature has declared that no action can be maintained against an executor or administrator on such a contract, as a contract. The policy and letter of our law practically make all contracts of that nature void as contracts, by taking away all right of action on them as contracts.

The wisdom of the law is evident. When the man is dead, the fight for the estate begins. Secret contracts are easily fabricated. The man is dead and can not contradict or explain them. The estate may be plundered to the prejudice of lawful heirs; therefore, to protect the heirs the law declares that there shall be no incumbrance on the estate except such as might have been enforced during the life of the testator, or such as he imposed upon it by will in the presence of witnesses as prescribed by law. But whether wise or not, such is our law, and we are bound by it.

Of the remaining four cases so cited, they are, in support of the following propositions, respectively:

1. An agreement to devise land in consideration of the payment of an annual sum vests an equitable title in the obligee. *Johnson v. McCue*, 34 Pa. St. 180.

2. A deed referring to and incorporating a will is good, and, taking the two papers together, shall be considered a deed, even if the disposition of the property is to take effect in the future. *Dawson v. Dawson*, Rice's Eq. 260.

3. Where a deed conveys lands for such uses as are not set out in a will already made, neither deed nor will is revocable, if no power of revocation is in the deed. *Mayor etc. of Baltimore v. Williams*, 6 Md. 262.

I do not think there is anything in these three cases to break the force of the long line of authorities cited to show what constitutes a will. And such was the opinion of the supreme court where those cases were cited, for the instrument in question there was held to be a will, although in the form of an obligation to pay a certain sum of money after death.

The last of the twelve cases cited to establish the instrument in the Iowa case as a contract is directly in harmony with those I have cited as establishing the instrument here as a will. It is cited as follows: "A test for determining whether an instrument is a deed or a will is, if the instrument was effective and operative at its execution, it is a deed. If it was only to be effective and operative in the future, it is a will." *Cummings v. Cummings*, 3 Ga. 479.

Judge Saffold, who delivered the able opinion in *Schumaker v. Schmidt*, 44 Ala. 454; S. C., 4 Am. Rep. 135, says that in *Golding v. Golding*, 24 Ala. 122, "an instrument conveying a posthumous interest was regarded a deed, because it could not operate as a will for want of the requisite number of witnesses." *Golding v. Golding* is not accessible to me, but if the court really did adopt that rule for determining whether an instrument was a deed or a will, I can only state that I consider in so doing it not only departed from the established authorities, but broke new and dangerous ground. I understand the character of the instrument is determined by the character of the estate conveyed, and not by the argument *ab inconvenienti*. By the rule in *Golding v. Golding*, as stated, every defective will would, if possible, be enforced in some other form, often to the exclusion of a prior perfect will, and the door would thus be opened to endless fraud, for if the requisite number of witnesses to a will may be dispensed with, all witnesses may be omitted, and the forger require no confederate in wresting any estate from the lawful heirs. The statute of wills would become a nullity, and no estate would be safe. *Golding v. Golding* is in direct conflict with *Habergham v. Vincent*, herein cited,

where the instrument was executed for a deed, could not fully operate as a will for want of the requisite number of witnesses, and yet was still held a will and not a deed.

In the case at bar, the instrument could not be effective to pass any interest to either party until the death of the other. All of the property prayed for by this bill was the individual property of the deceased, outside of the partnership funds, consisting of jewelry and diamonds, which he might at any time have disposed of as he saw fit. It was only in the event of his death with that property in his possession and ownership that plaintiff could acquire any interest in it. Therefore, it seems clear to me that if plaintiff has any claim at all on this estate, it is a claim as heir under a testamentary document, and not as a creditor of the deceased, nor as one taken under a contract. The instrument at bar is therefore a will.

This brings me to the question, Can our district courts establish a will? The instrument in this case is in law a will, but it has not yet been probated so as to have legal force as a will; could the district court have proceeded to hear proof of the execution of this instrument and establish it as the will of deceased? or could it grant any relief to the plaintiff on his bill until the legal proof of the character of this instrument had been regularly made? or could it even then give relief on original bill?

Plaintiff did not pray for the allowance of a money demand against the estate. He expressly declared that no money judgment was possible. He prayed for the estate itself, alleging that he was the person properly entitled to receive it, and asked for an order removing the whole estate from the control of the administrator and placing it in his own hands for settlement. He asked the court below to set aside all proceedings had in the probate court, and to take upon itself the task of ordering the administration and settlement of the estate. He assigns no reason why he did not seek relief in the probate court first. He did not allege any irregularity or fraud in the proceeding of the probate court connected with this estate, and did not show that he could not at the time of commencing his action in the district court have obtained relief even then in the probate court, but on the contrary, as will be seen hereafter, he showed that the

probate court at that time still had jurisdiction of this estate, and that his demand could have been heard and determined there; nevertheless, he presented the demand in the first instance to the district court, the presentation he made to the administrator being no presentation at all.

Under our system, have our district courts the power, even as courts of equity, to take original jurisdiction of such a demand? To answer this question, we must inquire a little into the constitution of our judicial system. If we go back to the source of our judicial power, and note how this power has been ordered, arranged, and distributed, then if there has been any express disposition made of the particular power required in this case, we can easily find where it has been lodged.

The act creating the territory, in force long before the execution of the instrument which is the foundation of this action, and ever since and now in force, declares as follows: "The judicial power of said territory shall be vested in a supreme court, district court, probate court, and in justices of the peace." Section 10, organic act of New Mexico, made applicable to Arizona February 24, 1863. By the same act the following decree was made concerning the jurisdiction of said courts: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law." *Id.* By the same act the power to limit this jurisdiction was given to the legislature of Arizona in these words: "The legislative power [of Arizona] shall extend to all rightful subjects of legislation, consistent with the constitution of the United States," etc. *Id.*, sec. 7.

The supreme court of the United States has passed upon this question as to what this grant of power means, and has defined it in the following language: "Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system in operation, even to the defining of the jurisdiction of the several courts—as a general thing subject to the general scheme of local government chalked out by the organic act,

and such special provisions as are contained therein. The local legislature has been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke, at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the state courts, a very different jurisdiction from that exercised by the circuit and district courts of the United States—in fine, the territorial, like the state, courts are invested with plenary municipal jurisdiction.” *Hornbuckle v. Toombs*, 18 Wall. 655.

This disposes of the claim made by plaintiff that the legislature has no power to say that a man may not dispose of his property after death by compact or contract instead of by will, if he desires to do so. The legislature has *full power* over all *rightful* subjects of legislation, and the matter of the disposition of estates is generally admitted to be a *rightful* subject of legislation. Some deny it, I know. There is a school of sociologists which claims that no man by any human law can rightfully have any exclusive control of any property either before or after death, but the *dicta* of these philosophers are not authority in this court. Our political and judicial systems recognize that these matters are proper and *rightful* subjects of legislation, and our legislature has full power in the premises.

In the exercise of this power, the legislature enacted an elaborate probate law of three hundred and six sections, and gave to the probate court exclusive original jurisdiction of the settlement of the estates of deceased persons. *Laws*, 1873, p. 100.

It also enacted a law concerning “wills,” and gave like jurisdiction thereof to the probate court. *Comp. Laws*, 1871, p. 250. The following is one of the sections thereof: “Sec. 5. No will made within this territory, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested and sub-

scribed in the presence of the testator by two or more competent witnesses," etc. (The remainder of the section says, merely, that if the witnesses are competent at the time, subsequent incompetency is immaterial.)

Here is another section of the same law: "Sec. 13. No will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court as provided by law, or on appeal in the district court, or supreme court; and the probate of a will of real or personal estate as above mentioned shall be conclusive as to its due execution." It will be noticed by referring to the instrument that it was made in this territory; and section 5 of our statute of wills not only says that the instrument at bar, having only one witness, shall, as a will, not only not *pass* any estate, but shall not *charge* or in *any way affect the same*. This certainly cuts off even all equitable relief under such an instrument, or any testamentary document not fully up in all respects to the express requirements of section 5.

By another act the legislature created the office of public administrator, and made it his duty to administer upon all intestate estates, under the direction of the probate court. The district court has no right to direct him in his duty except on appeal. Comp. Laws, 566.

Section 294 of the probate act provides that the mode of reviewing the action of the probate court shall be by appeal to the district court. Laws, 1873, p. 162. This appeal is not taken by filing original bill in the district court, but must be on notice in the probate court; and the proceedings as to the notice, bond, transcript, etc., are the same as on appeal from the district court to the supreme court. Prob. Act, secs. 293-299.

Section 60 of the probate act provides that notice shall be publicly given of all applications for letters of administration and of the time of hearing. Section 61 provides that any person interested may contest the application, assert his rights, etc. Section 62 provides that on hearing the court shall make such order concerning the issuance of letters as the case may require, and in the section concerning appeals special mention is made, that an appeal to the district court may be had from such an order of the probate

court. There is still another way of removing an administrator, and this one was open to the plaintiff at the time he filed his bill below.

Section 98 of our probate law reads as follows: "Sec. 98. If after granting letters of administration on the grounds of intestacy a will of the deceased shall be duly proved and allowed by the court, the letters of administration shall be revoked, and the power of the administrator shall cease, and he shall render an account of his administration within such time as the court shall direct." Laws, 1873, p. 117. The right to take the property from an administrator once appointed is thus expressly reserved to the probate court. The administrator may answer to the demand made by plaintiff in this case: I know nothing of orders direct from the district court. I gave a bond to answer for this estate to the *probate* court. The law requires me to act under the direction of the *probate* court. I have no settlement with the district court. I must report to the probate court and settle there before I can get my discharge. If I come back empty-handed to the only court with which I have to deal, an order from the district court direct to me will not excuse me. I can take my orders only from the probate court. The district court may speak to me only through the probate court. By section 299, probate act, the only way a judgment of the district court can reach me is by having a copy sent to the probate court and there entered as the judgment of the probate court. Then I am able to settle with my court, for I can cite its own judgment as my authority for surrendering the estate; but this can only be done in the case of an appeal, or perhaps in the different actions permitted against me, but of which, in any event, this is not one. All of the aforesaid acts were in force before the execution of the instrument which is the foundation of this action, and ever since have been and still are in force.

The plaintiff states, of his own knowledge he knows that the deceased died intestate; that the public administrator of Pima county duly applied for letters of administration on the estate of the deceased, and that the probate court, by an order duly entered and filed, granted such letters, and he stated other facts going to show that the proceedings of the

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probate court in the premises were all in regular accordance with law, and that he had full notice of all proceedings in this matter in the probate court.

The question then is, Had he the right to ignore all those proceedings of the probate court, to neglect his protest, waive his appeal, and file his original bill in the district court praying that the order of the probate court be considered a nullity, and that the whole estate be removed from the control of the administrator and be given to heirs? I think it is clear that he could not. The district court has no power to entertain such a bill. Plaintiff showed, by his own bill, that the administrator was, *prima facie*, rightfully in the possession of the estate and administering upon it according to law. He alleged no reason why all the regular and orderly proceedings of the probate court should be set aside, ignored, made absolutely null and void, except to allege that he himself, by virtue of a certain document, was the rightful heir to the estate, and should be put in possession thereof.

But the twenty-ninth section of the probate act tells him what he should do under such circumstances; he should have exhibited his testamentary document to the probate court, and asked to have it admitted as the will of the deceased. Administration was still going on in the probate court, and there was a special provision of law for such a case as plaintiff said he had, namely, a document disposing of an estate which had been declared intestate. If the probate court admitted it as good, it would have revoked the letters of administration of the public administrator, and put the plaintiff, or some proper person, in possession. If the court ruled against him, then he could have gone to the district court on appeal, and he would have been entitled to a hearing; but he might just as well go to the supreme court, or the court of another territory, with his claim, as to go into the district court by original bill. The law has created a special court to consider such claims, and has given it exclusive original jurisdiction of such matter. The only grant of original probate jurisdiction found in our law is to the probate courts, and the statute fixing the jurisdiction of the district courts excludes it therefrom.

The sections are as follows:

"Sec. 12. In addition to the jurisdiction of the district courts as conferred by the constitution and laws of the United States, their jurisdiction shall be of two kinds: first, original; second, appellate.

"Sec. 13. Their original jurisdiction shall extend to all civil cases where the amount exceeds one hundred dollars exclusive of interest, and to all criminal cases not otherwise provided for. In cases involving the title or possession of real property, and in all issues of fact joined in the probate court and brought into this court as provided by law, their jurisdiction shall be unlimited.

"Sec. 14. The appellate jurisdiction of these courts shall extend to hearing on appeal. * * * 2. An order or judgment of the probate court in the cases prescribed by statute." Comp. Laws, 376.

This shows that the probate court has exclusive original jurisdiction at law of all probate matters, and it is only where a matter can not be heard and determined by the law courts that the powers of a court of equity may be invoked. If a claimant neglects or refuses to appear in the proper court, it is his own lookout, and even the power of a court of equity can not save him. The district court could not hear the claimant in this case upon original bill, even if he had been beyond seas at the time this administration was granted, and had come back with a perfectly regular will—nay, not even though his will were good, and a forged one had been probated in his absence, the administration being still in progress. An application to a court of equity to practically set aside an order of a probate court giving an estate into the hands of a public administrator, differs in no respect in principle from an application to set aside the probate of a will. It is an application, in each case, to review and reverse upon original bill the action of a probate court in a matter where that court has exclusive original jurisdiction.

In the case of *Broderick's Will*, 21 Wall. 503, there was an application to a court of equity to annul the action of a probate court in admitting a will to probate. As stated by Wallace, it was "a suit in equity brought by the alleged heirs at law of David C. Broderick, late United States sen-

ator from California, to set aside the probate of his will and have the same declared a forgery, and to recover the said Broderick's estate, much of which consisted of lands now comprised in the thickly settled portions of the city of San Francisco." It is evident from this that it was a great case. It was carried to the supreme court of the United States. The bill charged fraud in the probate, fraud in the will, fraud in the sale, fraud in the purchasers, fraud from beginning to end, and that the plaintiffs were beyond seas at the time, and knew not of the fraud until administration had closed in the probate court, wherefore they had no possible relief at law, and therefore prayed for it in equity. Could a stronger case be presented? Yet the bill was demurred to, demurrer sustained, and the judgment affirmed by the supreme court of the United States.

The first ground taken was that the equity courts had no jurisdiction, the matter being vested exclusively in the probate courts. In considering this point, the court declares as follows: "As to the first point, it is undoubtedly the general rule, established both in England and in this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrich v. Bransby*, 7 Bro. C. P. 437, decided by the house of lords in 1727, is considered as having definitely settled the question. * * * And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery to give full and adequate relief."

The court quotes with approval the language of Lord Lyndhurst in *Allen v. MacPherson*, 1 Phill. 133; S. C. on appeal in the house of lords, 1 H. L. Cas. 191. In that case a bill was filed in chancery to annul the action of a probate court in admitting a codicil, charged to have been obtained through fraud. The bill was demurred to and dismissed. The judgment of the court sustaining the demurrer was affirmed. "If," says Lord Lyndhurst, in the house of lords, speaking of the action of the probate court, "an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the

decision of the court of probate, not by the judicial committee of the privy council, the proper tribunal for that purpose, but by the court of chancery. I think this can not be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity, but that doctrine has long since been overruled." 1 H. L. Cas. 209.

The court also quotes with approval the language of the supreme court of California in the case of *State of California v. McGlynn*, 20 Cal. 233, 268, as follows: "Upon examining the decisions of the supreme court of the United States, and of the courts of the several states, it will be found that they have uniformly held that the principles established in England, apply to and govern cases arising under the probate laws of this country, and that in the United States whenever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on appeal to a higher court, to be questioned in any other court, to be set aside or vacated by the court of chancery on any ground."

The following language is also used by the court at page 517: "The question recurs, Do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of Broderick's will or for establishing a trust as against the purchasers of his estate in favor of the complainants? On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case, a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief." The last words do not mean that the probate court was open at the time the action was begun. It is admitted that it was closed at that time, as to the complainants, but that it had been opened to them the necessary time, and that it was *laches* on their part not to apply in time; that there was nothing in their claim that they did not really have *actual* notice of the proceedings in the probate court, being beyond seas at the time, that the requisite *legal* notice was given by publication, etc., and that they were bound by it, otherwise all proceedings *in rem* would be unsettled.

The particular point decided in the foregoing case was that the action of the probate court, in determining that a valid will *had* been made, could not be reviewed in a court of equity on original bill, but on the same principle the court must have necessarily declared that it could not interfere if the decision had been that a valid will had *not* been made, as was the case here. The principle recognized is, that the review can not be had on original bill, but must be by appeal. In this case the probate court, having regularly acted concerning this estate, and the plaintiff not having appealed, being guilty of *laches* to that extent, but still having his remedy at law, under section 98, probate act, he did not present a case, as upon a will, of which the court had jurisdiction, and the bill was properly dismissed.

It has been urged that this is a case for the exercise of the large, broad, general principles of equity, that there was a manifest intention here to pass the property in question to plaintiff, and that it is the duty of a court of equity to in some way carry out that intention, that if this instrument is held to be a will, the intention of the deceased will be defeated, because the instrument can not stand the test of the probate court, there being but one witness, and the statute of wills requiring two, and therefore the court must endeavor in some way to give force to this instrument, otherwise the plaintiff will be left without relief.

There are limitations, however, even upon the jurisdiction of a court of equity. Equity courts have extraordinary powers, but they are not beyond the reach of statute law, neither are they independent bodies, careering at will through the vast domain of law with no fixed rules for their guidance. The system of jurisprudence administered so grandly by Cardinal Wolsey, so cautiously by Sir Thomas More, defended by Lord Ellesmere, systematized by Lord Bacon, exalted by the genius of Lord Nottingham, the father of equity, defined by the exquisite discernment of Lord Hardwicke, developed, perfected, and ennobled by the commanding powers of such men as Mansfield, Camden, Thurlow, Eldon, Marshall, Kent, Story, and other worthy compeers, will not be found devoid of definite rules of procedure.

If we look for rules to guide us in the present case we shall not fail to find them; for instance: he who asks equity

must do equity; he who appeals to equity must submit to equity, and to obtain relief he must show that the equities are in his favor; that his equities overbalance those on the other side. But where are the superior equities of the plaintiff in this case? Why must he be favored in any especial manner to the prejudice of the heir he seeks to disinherit? What has the natural or legal heir done that not only *his* equities but his *legal rights* must be set aside?

The plaintiff, in form, asks equity for himself, but in fact he has appealed to a court of equity to judge in conscience between him and the heir at law, to weigh the equities in each case, and declare whether or not the conscience of the heir at law is bound by this defective and illegal instrument of the ancestor; to prevail, he must not only show as *good* a right to the property as that of the legal heir, but he must show a *better* one. The heir is in possession. The administrator is holding for him. The plaintiff seeks to oust him, and unless he shows the *better* right he must fail, for in *æquali jure melior est conditio possidentis*; the heir is defending, and in *æquali jure melior est conditio defendentis* (Broom's Max. 564); the heir is first in the field, and *qui prior est in tempore, potior est in jure*; the plaintiff seeks to destroy the legal succession by a private compact, but *fortior et potentior est dispositio legis quam hominis*; he seeks to set aside the strict law of the case in favor of his equity, but "where the equity is equal, the law must prevail;" he asks relief against the law, but "where the law has determined a matter, with all its circumstances, equity can not intermeddle against the positive rules of law." Fonbl. Eq., b. 1, c. 1, p. 83. "And equity will not interfere in such cases, notwithstanding accident or unavoidable necessity." *Id.* He says that under the rules of law he has no relief, but Lord Talbot declares, "Where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it and extend it further than the law allows." Cas. Temp. Talbot, 174; he says deceased intended to name him as his heir, but if a man leaves his will unfinished there can be no relief. See half a dozen cases cited, 1 Story Eq. Jur., sec. 61, c. 111; he says the strict letter of the statute defeats the will of the deceased, but "where a rule

either of the common or the statute law is direct and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." 1 Story's Eq. Jur., sec. 64, citing *Kemp v. Pryor*, 7 Ves. 249; 2 Bac. Abr., Court of Chancery, C. And see *Habergham v. Vincent*, *supra*.

Our statute says distinctly the instrument in the case at bar shall not stand as a will, for lack of witnesses; nor, I think, as a contract, because the maker is dead, and it could not be enforced against him during his life; and yet it is either a contract or a will, one or the other, beyond all question; so that it is very far from being clear that the plaintiff has any equities at all under this instrument. No equity can arise under it as a contract, for our statute forbids an action on it, and "if the law prohibits a thing to be done, equity can not enjoin the contrary." 1 Story's Eq. Jur., sec. 64.

No equity can arise on the instrument as a will, for as such it is defectively executed, and Smith, in stating some of the elementary principles of equity jurisprudence, gives the following illustration: "Thus no relief will be afforded to the legatees or devisees under a will defectively executed, for, being mere volunteers, they have as little equity as the heir or next of kin, or even less, inasmuch as *fortior et æquior est dispositio legis quam hominis*, Co. Lit. 388 a, and therefore the legal right which has vested in the latter will not be taken away, as the maxim is, that 'where the equity is equal the law must prevail.'" Smith's Man. Eq., 11th Lond. ed., 38-9.

A will is not executed until it is signed, duly attested, and declared or published so as to be rendered complete and operative. See Burr. Law Dict., "Execution;" Bouv. Law Dict.; 4 Kent's Com. 450, 513, and notes; Bla. Com. 376.

This matter of disposing of property by will has never been recognized by any government as a natural right. It has always been looked upon as a matter of public policy, to be granted as a *privilege*, subject to such conditions for its exercise as the law-making power chooses to impose, or to be withheld altogether if it is considered the interest of the state will be promoted thereby. And so we find in-

numerable varieties of statute law on the subject, not only denying the head of the family the privilege of making a will, but cutting off all right of natural succession. Giving not only all the property to the king, but also the wife and all unmarried children, so that to escape it the children were married in infancy, *Esprit des Loix*, lib. v., c. 14., is one extreme in legislation on this subject. This doctrine of escheats, though modified, has never been fully surrendered by any government. It exists to-day in this territory. It is the only part of the law of succession which all nations have always in some shape preserved. All improvements in the law of succession consist merely in concessions by governments of parts of this asserted right. The right of escheat is a corollary of the doctrine that everything belonged primarily to the crown, and that the subject enjoyed even a life estate in property only by favor. For the doctrine, see *Crag. de Jur. Feud.*, 233, cited in *Wright's Tenures*, 59.

'The people everywhere have always pressed for an increase of rights over property. At first they asked only that it might descend to their natural heirs. Under the feudal law, when this privilege was granted it was conditional on the lord's choosing the heir, or fine, fealty, homage, petition, proclamation—whence heriots, relief, primer seisin, etc. *Gilbert's Ten.* xvi. Then the people claimed the right to name the heir themselves—in other words, to devise the property to whomsoever they pleased; but this point is not even yet everywhere yielded. It does not yet exist in France or in Scotland as to realty. It is only during the reign of the present queen that it has been fully granted in England as to realty, and even as to personalty it is only in a period comparatively recent that the privilege has been universally obtained even in England. *Redf. on Wills*, c. 1, sec. 5, note 10.

In at least one of our states, Louisiana, the privilege is not yet fully granted, and in this territory it is only within the last few years that it has been conceded; so that the plaintiff in this case must remember that he has no natural or inherent equities in this matter. He is a stranger in blood to the ancestor. All the rights he can possibly have herein depend upon a very recent statute, and this statute being

the very last and furthest advance made in granting the power to prefer strangers in blood to the natural heir, he must show a strict compliance with all the essentials of the statute to acquire any standing at all in court. The *equities* are in favor of the natural or legal heir. These heirs are in possession, and the plaintiff can not oust them except by showing not only an equitable claim, but a legal right to do so. This doctrine is not new. It comes down to us even from the old black-letter days; but though born of a former age, its sound principles of right and justice keep it ever green and vigorous, and it speaks to us to-day with undiminished power from the pages of our latest and highest authorities.

In the tenth edition of Story's Equity it stands in the text as follows: "Equity will not interfere to give effect to an imperfect will against an innocent heir at law, for, as heir, he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law." 1 Story's Eq. Jur., sec. 106, 10th ed. As authority for this proposition, Story cites Com. Dig., Chancery, 3, F, 6, 7, 8; 1 Fonbl. Eq., b. 1, c. 4, sec. 25, notes *k* and *n*; Grounds and Rudiments of the Law, M. 167, p. 128, ed. 1751.

The rules of law governing this case are set down in our book of statutes: 1. That the plaintiff can not acquire this estate by a contract, or in any way except by will; 2. That he can not acquire it by will, except by a good will, duly signed, attested, and probated. Equity can not play fast and loose with the essentials of statute law. The legislature is the law-making power, not the courts. The matter of witnesses to a will is not within the maxim, *De minimis non curat lex*. It is one of the primary, essential, indispensable conditions to a valid will, and a court of equity has no more power to dispense with it or avoid it, than it has to dispense with or avoid the whole statute of wills, or any other statute.

I do not then see that plaintiff made out any case for any relief in the court below. He did not ask legal relief as upon a claim against the estate in the sense of the probate act, and if he had, or if the court might have entertained the case for that purpose, he did not show any such

claim, and therefore did not state facts sufficient to constitute a cause of action in that regard. He could have no relief as upon a contract, for the only contract he set up was one on which our statute says no action can be founded; therefore the complaint failed to state facts sufficient to constitute a cause of action in that regard. He could have no relief as upon a will, for he did not produce a regularly probated will, nor even a properly executed will, and the court has no jurisdiction to establish a will, nor give any relief on one under the circumstances, even if a perfect will had been produced, for that court has no original jurisdiction of wills, and besides, administration was still proceeding in the probate court, a court which had full power to afford him legal relief, and to which he was bound to first submit his claim, and apply to the district court, if at all, only by appeal from the judgment of the probate court.

While limiting the reasons to the facts in this case, I do not mean to intimate any doubt about the law going as far as in this case cited. It is sufficient for present purposes to show that it covers this case. The doctrine in the case of *Broderick's Will*, 21 Wall. 503, evidently goes much further, the court being irresistibly led thereto by the controlling fact that the jurisdiction invoked is by law placed exclusively in another tribunal.

In looking over this opinion, I notice in some places what may be thought a little impetuosity of expression. I have not time, pressed as I am with other official duties, to recast the language; but however it may read, it is written in a spirit of entire respect for the judgment of the majority of the court, orally rendered, their written opinion not having yet been, so far as I know, prepared. This is the only case in which I have felt obliged to dissent from their judgment, and it is because of the great respect I know is due and accorded to their opinion, in any case passed upon by them, that I have taken the pains to try to show the reasons which led me to a different conclusion.

I am therefore of the opinion that the judgment of the court below sustaining the demurrer and dismissing the bill should be affirmed.

W. F. GROUNDS v. J. RALPH.

APPEAL DOES NOT LIE TO SUPREME COURT FROM JUDGMENT of a district court rendered by it on an appeal from a justice's court, when the amount of the judgment does not exceed two hundred dollars.

WHERE APPEAL IS FROM JUDGMENT ONLY, the judgment roll is the only thing that can be considered by this court, no matter how many other papers the clerk may choose to embody in the transcript. And if no error appear in the judgment roll, the appeal will be dismissed.

APPEAL from the district court of the third judicial district, Mohave county. The opinion states the case.

A. E. Davis, for the appellant.

Murphy and Blakely, for the respondent.

By Court, DUNNE, C. J.:

This cause was commenced in a justice's court, and was a money demand for two hundred and fifty dollars. Ralph obtained a judgment there for one hundred and fifty dollars. Grounds appealed to the district court; judgment was there given in favor of Ralph for sixty-two dollars and fifty cents, and costs. Grounds appeals to this court from the judgment.

1. An appeal to this court does not lie in such a case. The appellate jurisdiction of this court is established by law, as follows, Comp. Laws of Arizona, p. 365:

"Sec. 3. The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds one hundred dollars, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony, on questions of law alone.

"Sec. 4. The supreme court shall have jurisdiction to review, upon appeal or other proceeding provided by law: 1. A judgment in an action or proceeding commenced in the district courts, when the matter in dispute exceeds two hundred dollars, or when the possession of land or tenements is in controversy, or brought into that court from another court; and to review, upon the appeal from such judgment, any intermediate order involving the merits and necessarily affecting the judgment. 2. An order granting

or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding."

As this case was not commenced in the district court, and is not one of those which could be heard here in any event if the amount in dispute exceeded one hundred dollars, the appeal must be dismissed.

Even if the appeal could be entertained, the judgment of the court below would be affirmed. Appellant asks us to set aside the judgment, on the ground that the evidence is insufficient to support it, but he has furnished us no evidence to examine. The transcript contains a statement of evidence which was used on the motion for new trial, but there is no statement on appeal, nor any stipulation that the statement used on motion for a new trial should stand as the statement on appeal. There is no appeal here from the order denying a new trial. The appeal is from the judgment only. In such case the only thing before the court is the judgment roll as defined by statute, and no matter how many other papers the clerk may choose to embody in the transcript, this court can not act upon anything but the judgment roll.

The statute prescribes means by which this roll may be made full enough to cover every point made on the appeal, viz., by allowing a party to file a statement of points and evidence, even when the appeal is directly from the judgment. Then the party has also his motion for a new trial, and his appeal from an order denying it. In this case the party appealing has come up with a naked appeal from the judgment, and no statement whatever on appeal. In this case the judgment roll consists of an account filed in a justice's court and a copy of the judgment in the district court, and nothing else. Comp. Laws, sec. 205, p. 417. It is not claimed by the appellant that there is any error in this part of the transcript, neither on examination do we find any.

The appeal is dismissed with costs.

WILLIAM FORD v. I. C. HAYES.

INSOLVENT DEBTOR MAY LAWFULLY PREFER ONE CREDITOR TO ANOTHER, and an assignment made by him for the benefit of some of his creditors to the exclusion of others is valid, until proper proceedings are taken under the United States bankrupt act to avoid it.

ASSIGNMENT PREFERRING CREDITORS, MADE MORE THAN FOUR MONTHS prior to the institution of proceedings in bankruptcy, stands good in law.

APPEAL from the district court of the third judicial district, Maricopa county. The opinion states the case.

John A. Rush, for the appellant.

The question presented to the court in this case is, whether under existing bankrupt laws of the United States an insolvent can assign his property with a view to prefer creditors.

The appellant maintains that in so doing the insolvent commits a fraud, and that the assignment is void as to the other creditors. Voluntary assignments of property by an insolvent have for a long time been regarded by the courts with distrust and disfavor.

In the supreme court of California, in the case of *Chever v. Hays*, 3 Cal. 474, Chief Justice Murray says: "Assignments for the benefit of creditors (so called) have long been looked upon with jealousy, as a fruitful source of fraud and litigation, and the modern decisions have tended to discontinue rather than maintain them."

In referring to the giving of preference to creditors, Parsons says: "This is certainly opposed to the true principles of commercial policy, if not to natural justice."

Again, he says: "Such a preference always works injustice. It may only carry into effect a previous bargain or confidence; it may only pay a debt which it was agreed or understood should be paid at all events, whether others were or not, but this bargain or confidence was itself unfair."

In *Riggs v. Murray*, 2 Johns. Ch. 565, Chancellor Kent says: "As we have no bankrupt laws, the right of the insolvent to select one creditor and exclude another is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored:" 3 Parsons on Cont. 426, 427, and note *j*, p. 427.

Assignments by insolvents for the purpose of preferring creditors are fraudulent as against the policy of the bankrupt law. Kent, in his Commentaries, vol. 2, p. 532, says: "The validity of voluntary assignments of their property, by insolvent traders and others, has been another fruitful topic of discussion under a code of bankrupt laws. Such assignments giving preference are held to be fraudulent, for they interfere with its regulations and policy."

Parsons says: "The principles of the bankrupt and insolvent laws are directly opposite to this, and endeavor to prevent, or cure, the very mischief which the principle of preference causes. * * * It holds the property of an insolvent debtor not to be his own, but to the amount of the debt it is the money of another, and if he owes more than he can pay, his property belongs to his creditors, not to one more than another, but to all alike."

The bankrupt law provides for the distribution of the property of him who is unable to pay his debts. Persons contracting contract with a view to the law, and the law becomes a part of the contract. If this be so, the debtor who is unable to pay all, and contracts with one creditor for payment, to the exclusion of the others, perpetrates a fraud upon the others, and so does the creditor with whom he contracts, he being equally cognizant of the law. In support of the positions of appellant, counsel cites the following authorities: Bump's Bankruptcy, 466, 473, 511, 513, 529; 2 Kent's Com. 532, and note *d*, p. 392; 3 Parsons on Cont., text and notes, pp. 425-429; *Chever v. Hays*, 3 Cal. 472-474.

G. H. Oury, for the respondent.

An insolvent has a legal right to make an assignment of his property and prefer creditors. *Billings v. Billings*, 2 Cal. 107; *Dana v. Stanford*, 10 Id. 269.

The making of a trust and acceptance by a trustee are sufficient, especially when accompanied by delivery and possession of the property; where no conditions are imposed on creditors, acceptance is presumed. The assignee having taken possession of the property, the trust becomes fixed and executed beyond the power of the assignor to defeat it. *Forbes v. Scannell*, 13 Cal. 242.

By Court, DUNNE, C. J.:

One Strode, being on the third of June, 1873, insolvent, preferred certain of his creditors, the plaintiff Ford being of the number, and assigned to Ford for himself, in trust for the other preferred creditors, certain property in payment of his indebtedness to them, and possession of the property was delivered, and it is admitted that the assignment was for the purpose of paying *bona fide* existing debts. Certain other creditors of Strode sued, and Hayes, the defendant herein, as sheriff, attached the property held by Ford under the assignment and sold the same upon execution, whereupon Ford sued the sheriff for the value of the property so taken from him, and got judgment therefor in the court below. Hayes, the sheriff, appeals.

Counsel for appellant claims, that under the existing bankrupt laws of the United States an insolvent can not prefer creditors. He cites Chancellor Kent, in *Riggs v. Murray*, 2 Johns. Ch. 565, to the effect that, "as we have no bankrupt laws, the right of the insolvent to select one creditor and exclude another is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored."

Appellant herein states what is undoubtedly the law, that unless a bankrupt act makes such assignments void they stand good, although they work a hardship on the creditors who are left out. We have the United States bankrupt law in force in this territory, which furnishes relief in such cases. But how? By declaring all such assignments void *per se*? By no means. The bankrupt law merely provides, that any creditor who has been left out in the case of an insolvent debtor assigning his property may file his petition, cause the insolvent debtor to be declared a bankrupt, have all assignments which were made to a creditor within four months, or to any other person within six months, prior to the filing of the petition set aside, bring the property into a common fund, and make an equal distribution of it; but even when a creditor proceeds strictly under the bankrupt act, he can not touch assignments to creditors made more than four months prior to the institution of the bankruptcy proceedings. In notes of decisions in Bump's Bankruptcy,

p. 471, it is declared: "After the lapse of four months, the preferences—simple preferences which an insolvent debtor may have made—are to be held valid as against all the world, so far as the preferred creditor is concerned." See the twelve cases therein cited.

But the appellant is not proceeding under the bankrupt act, and its provisions, therefore, afford him no relief in this case. The law views such assignments with an unfriendly eye, and legislatures pass bankrupt laws to enable a creditor to set them aside; but unless he proceed regularly under the bankrupt law they stand good. It is because they do stand good in law that bankrupt acts are necessary to enable a creditor to avoid them.

Judgment affirmed, with costs.

J. L. MILLER, ADMINISTRATOR OF THE ESTATE OF J. B. MILLER, DECEASED, v. JENNY H. FISHER AND JOHN B. FISHER.

MARRIED WOMAN OF THE AGE OF TWENTY-ONE YEARS, OR UPWARDS, may convey or incumber her separate property in the same manner as if she was unmarried, and a conveyance thereof by her does not require to be acknowledged by her on an examination separate and apart from her husband.

COMPLAINT IN ACTION TO ENFORCE CONTRACT OF MARRIED WOMAN need not allege that she is of the age of twenty-one years or upwards. If the defendant is under that age, she may plead that fact as a matter of defense, but a failure to aver in the complaint that she is of that age is not ground for a general demurrer.

APPEAL from the district court of the second judicial district, Mohave county. The opinion states the case.

J. P. Hargrave and J. A. Rush, for the appellants.

This action is brought to compel the specific performance of a contract made by the defendant, Jenny H. Fisher, in the sale of her separate property, she being a married woman. A demurrer was interposed, and it was urged in the court below, in support of the demurrer, that the sale was void, not having been made in conformity with the requirements of section 6, page 306, of the compiled laws of

Arizona. That section requires that the sale shall be in writing, that the husband shall join, and that the writing shall be acknowledged by the wife. That section was enacted in 1865, and counsel for appellants maintain that it was repealed by the act of 1871, relating to the separate property of married women. Comp. Laws, 310, sec. 1.

Counsel for appellants cite as authority the acts of the legislature of Arizona in regard to the rights of married women. Comp. Laws, 305-310.

The court below erred in sustaining the demurrer and giving judgment for the defendant.

A. E. Davis, for the respondent.

The appeal is from the judgment of the court in sustaining the demurrer to the complaint. While the complaint shows that the alleged contract was made with a *feme covert*, it does not allege that it was made in the *manner* and *form* required by law, and hence can not be enforced. Comp. Laws, 306, c. 32, sec. 6.

The act of 1871, relating to the separate property of married women, does not repeal any other portion of section 6 than that which gives the husband the control and management and requires him to join in the writing necessary for its conveyance, alienation, etc.

The evident intention of the legislature was, by the provisions of section 6: 1. To give the control of the wife's separate property to the husband; 2. To protect her against any duress he might attempt to exercise over her in relation to the disposition of that property.

The amendment of 1871 intends to further the independence of the wife by relieving her of the necessity of the consent of her husband in the management or disposition of that property, but it does not directly nor impliedly do away with the second provision of section 6, viz., that her disposition or incumbrance of the separate property shall be by a written acknowledgment, separate and apart from her husband, etc., that it was her free act.

In the construction of a statute, force and effect is to be given to every portion of it, and courts will not, except when the language is so vague and indefinite as to be destitute of meaning, reject any part of it. *Chever v. Hays*, 3

Cal. 471; *People v. Waterman*, 31 Id. 412; *San Francisco v. Hazen*, 5 Id. 169; *Smith v. Randall*, 6 Id. 47; *Seabury v. Arthur*, 28 Id. 142; *Burnham v. Hays*, 3 Id. 115; *Cullerton v. Mead*, 22 Id. 95.

Statutes in derogation of common law must be construed strictly. *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 397; 1 Kent's Com. 502, 513.

An act containing a clause repealing all acts and parts of acts inconsistent with its provisions, but not repealing by name a previous act on the same subject-matter, leaves in full force all such portions of the previous act as are not in conflict with its provisions. *People v. Durick*, 20 Cal. 94. Repeal of statutes by implication is never favored. *Crosby v. Patch*, 18 Cal. 438; *Scofield v. White*, 7 Id. 400; *People v. San Francisco & S. J. R. R. Co.*, 28 Id. 254.

A contract by a married woman is null and void unless evidenced by writing duly acknowledged in the manner and form by law required. *Barrett v. Tewksbury*, 9 Cal. 13; *Macloy v. Love*, 25 Id. 367; *Love v. Watkins*, 40 Id. 547.

The complaint does not allege that Jennie H. Fisher is not of the age of twenty-one, and upwards.

By Court, TWEED, J.:

The appeal is from the district court, second judicial district, Mohave county. As appears by the complaint, the action was brought to enforce the performance of a verbal contract entered into by the defendant, Jenny H. Fisher, a married woman, for the sale and delivery of certain personal property to the plaintiff, the same being her separate property, and claimed and held by her as such.

A demurrer to the complaint was interposed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and from the judgment thereon the appeal is taken. The counsel for the respondent relies upon two points made in his brief and argued at the hearing of the cause: 1. That the sale or alienation of the property mentioned in the complaint was not evidenced or accompanied by any instrument in writing, signed by the said Jenny H. Fisher, and by her acknowledged upon an examination separate and apart from her husband before a proper officer, and that the same was

therefore void. 2. That it is nowhere alleged in the complaint that the said Jenny H. Fisher is of the age of twenty-one years.

Upon the point first made, the counsel cites section 6 of amendments to chapter 32, compiled laws, page 306, approved December 30, 1865, and insists that the act relating to the separate property of married women, approved January 22, 1871, compiled laws, page 310, modifies the section cited to the extent only that the wife need not be joined with her husband in a sale or alienation of her separate property, but that such sale or alienation must be made or accompanied by some written instrument signed by her, and by her acknowledged upon an examination separate and apart from her husband, etc. It is pertinent, in considering this point, to refer to the provisions of the law upon the subject prior to the passage of the act of 1865, hereinbefore referred to.

The first section of chapter 32, Howell's code, approved November 10, 1864, and passed at the first session of the legislature of the territory, reads as follows: "The real and personal property of every female acquired before marriage, and all property real and personal to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her, in the same manner and with the like effect as if she were unmarried."

The chapter was amended by the act of December 30, 1865, hereinbefore referred to, the sixth section of which reads as follows: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by instrument in writing, signed by husband and wife, and acknowledged by her upon an examination separate and apart from her husband before a justice of the supreme court, probate judge, or notary public; or if executed out of the territory, then acknowledged by some judge of a court of record, or

before a commissioner appointed under the authority of this territory to take acknowledgments of deeds."

The act of January, 1871, reads as follows: "Married women of the age of twenty-one years, and upward, shall have the sole and exclusive control of their separate property; and may convey and transfer lands, or any estate or interest therein vested in or held by them in their own right, and without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried."

It will be seen that the act of 1864, the first legislation upon this subject had in the territory, placed the wife upon precisely the same footing with unmarried women as to any contract, sale, transfer, or mortgage of her separate property. The husband had no legal interest in such property, nor need he, in any manner, be consulted as to its disposition. She was competent to make contracts concerning it by parol or in writing, in the same manner as any other person might do as to his or her separate property. Then in 1865 the law was changed, and the entire control of the property was given to the husband, guarded, however, by requiring proof of the wife's consent to any alienation; and herein arose the necessity for the provision as to an examination and acknowledgment separate and apart from her husband.

We have examined these several statutory provisions with care, and we can not adopt the construction which the counsel for the respondent applies to the act of 1871. On the contrary, we think it clear that that act was intended wholly to exempt married women of the age of twenty-one years and upwards from the operation of section 6, in the act of 1865, and to place them precisely where they stood in regard to their separate property under the law of 1864, leaving said section in full force as to married women under that age, who might well be supposed to need the security from imposition provided by the act of 1865 more than persons of more mature age.

The second point made by the respondents is not well taken. It does not appear from the complaint that the defendant, Jenny H. Fisher, was under the age of twenty-one years. If such was the fact, it might have been pleaded as matter of defense, but the failure to aver in the complaint

that she was of the age of twenty-one years is not ground for a general demurrer.

Judgment must be reversed and the cause remanded for future proceedings, and it is so ordered.

IN THE MATTER OF THE PETITION OF RICHARD WOFFENDEN FOR A WRIT OF MANDAMUS AGAINST THE BOARD OF SUPERVISORS OF PIMA COUNTY.

WRIT OF MANDAMUS WILL NOT BE GRANTED TO CONTROL ACTION of any inferior court, board, or officer, in matters wherein their acts are of a judicial character, or wherein they are called upon to exercise discretion; but where their acts are ministerial only, and they fail or refuse to perform any act required by law, and the party injured has no other speedy and adequate remedy, he is entitled to this writ.

PETITION for writ of *mandamus*. The facts are stated in the opinion.

Hugh Farley, for the petitioner.

John Titus, for the respondents.

By Court, TWEED, C. J. :

In the matter of the petition of Richard Woffenden for a writ of *mandamus* against the board of supervisors of Pima county, all the material facts set forth in the petition are admitted by the answer of the respondents. They are substantially as follows:

At the October term of the district court held in and for the county of Pima, for the year A. D. 1874, the chief justice ordered a *venire* to issue for the summoning of trial jurors for the term. Of those summoned and in attendance during the term, certain jurors were excused from daily attendance for a portion of the term when their services as jurors were not required. The trial jurors were summoned to appear on the sixteenth day of November, and the jurors in whose behalf this petition is presented were in attendance upon the court as trial jurors from the sixteenth day of November until the twenty-sixth day of December, except when excused from daily attendance, as above stated. After the trial

jurors were discharged for the term, the clerk of the court refusing to include in the certificates given to jurors as to the time of attendance "the days in which such jurors had been excused by the court from actual attendance," such jurors applied to the court to have said days included in said certificate, whereupon the court ordered that the clerk issue to said jurors separate certificates for the time during which such jurors had been excused from personal attendance. The clerk delivered to said jurors the certificates contemplated by said order of the court, and the same being presented to the board of supervisors, as claims against the county, were disallowed.

Certain of said jurors have assigned their claims for such services to the petitioner, who is now the owner and holder of the same.

The writ of *mandamus* will not be granted to control the action of any inferior court, board, or officer, wherein their acts are of a judicial character, or in which they are called upon to exercise discretion; but when their acts are ministerial only, and they fail or refuse to perform any act required by law, and the party injured has no other speedy and adequate remedy, such party is entitled to this writ.

The admission by respondents, that the jurors named in the exhibits accompanying the petition were summoned, were in attendance, and were excused by the court for certain days during the term, is conclusive of their right to the usual compensation and of the regularity of the clerk's certificate, and leaves the board no discretion in the matter. Their duty was to audit the claims. We do not intend to say that the clerk's certificate would always be conclusive; he might purposely issue a false certificate, and in such a case the board might, as provided in sections 474-479 of the civil practice act, concerning *mandamus*, in their answer to the petition raise the question of fact; the court would then order the question of fact to be settled by a jury, and on the finding of a jury the court would grant or deny the writ as justice might require, it being always remembered that the writ will not be granted where the party has a plain, speedy, and adequate remedy in the ordinary course of law.

But in this case the admission by respondents of the facts set up in the petition are equivalent to an admission that

the clerk's certificate was properly issued, and left no discretion in the board to reject the claim.

Let peremptory writ issue as prayed for by petitioner.

DANIEL C. THORNE v. GEORGE W. BOWERS.

WHERE ONE AGREES WITH ANOTHER TO TAKE A CERTAIN SUM FOR HIS PROPERTY, and the latter then sells it for double that amount, and the former conveys directly to the purchaser, the one so conveying can not recover from the party with whom he made the agreement the excess over the agreed price, where there is no evidence of fraud, or that he was acting as agent in the transaction.

APPEAL from the district court of the third judicial district, Yavapai county. The opinion states the case.

John A. Rush and H. H. Cartter, for the appellant.

Hargrave and McDaniel, for the respondent.

By Court, DUNNE, C. J.:

Action begun by Thorne to recover six hundred and sixty-six dollars and sixty-six cents from Bowers. Thorne alleged that Bowers had received this sum in the sale of some mining ground in such a way that it was properly due and owing to Thorne, and had not been paid to him. Defendant denied. On the trial plaintiff gave in evidence that he and one Hogle and one Cassidy owned a mining claim together, of two hundred feet in length, on a certain quartz lode, each owning a one-third interest; that defendant Bowers and several other parties owned the adjoining claim of two hundred feet on said lode; that on a certain occasion Bowers said to plaintiff that a certain person would buy these claims, if he could get all the interests, that is, the whole two hundred feet in each claim, or four hundred feet in all, and that this person was willing to give ten dollars a foot for it, and asked plaintiff if he would take that sum; that plaintiff said he would, and ultimately joined all the other parties in a deed for the whole of said four hundred feet, and received for his interest ten dollars a foot; that he did not notice the consideration in the deed at the time

of signing it, but afterwards learned that it was four thousand dollars, which would have been an average of twenty dollars a foot, and that he subsequently learned that some of the other vendors got twenty dollars a foot; that he charged Bowers with having negotiated the sale, and having received from the purchaser twenty dollars a foot for his, plaintiff's, interest, and that he therefore had six hundred and sixty-six dollars and sixty-six cents, which properly belonged to plaintiff; that Bowers neither admitted nor denied having received twenty dollars a foot for plaintiff's ground, but said in reply to the demand for the money, "How are you going to get it?" When plaintiff closed his evidence, the court below granted a nonsuit against him, on the ground he had made no case. Plaintiff appealed.

We think the nonsuit was properly granted. It is true the evidence, though not showing the fact, might be considered as *tending* to show that Bowers received twenty dollars a foot for plaintiff's ground, but we do not think there is anything in the evidence which tends to show that if he had received such money it was any fraud on the plaintiff. There is nothing tending to show that Bowers acted as agent for plaintiff; or was under any obligation to pay the extra ten dollars a foot to plaintiff, even if he had received it from the purchaser.

Judgment affirmed, with costs.

A. E. DAVIS AND ALDER RANDALL v. PAUL BREON.

LAW DOES NOT IMPLY PROMISE TO PAY FOR USE OF PERSONAL PROPERTY where such use is with permission of the owner.

COMPLAINT MERELY ALLEGING THAT DEFENDANT USED PERSONAL PROPERTY of the plaintiff with the latter's permission, and that such use is reasonably worth a sum claimed, does not state facts sufficient to constitute a cause of action, and a general demurrer thereto is properly sustained.

APPEAL from the district court of the third judicial district, Mohave county. Action to recover for the use of personal property. The opinion states the case.

Davis and Henning, for the appellants.

Murphy and Blakely, for the respondent.

By Court, DUNNE, C. J.:

This is an action to recover for the use of personal property, based upon the assumption that the law implies a promise to pay from the fact of use with the permission of the owner. It is in fact for the rent of a house; but the complaint alleges that the house is personal property. It was demurred, among other things, that the complaint did not state facts sufficient to constitute a cause of action. Demurrer sustained, and judgment for the defendant. The appeal is from the order sustaining the demurrer. The appeal being from the judgment on the demurrer, the allegation in the complaint that the property used was personal property must, for the purposes of this hearing, be taken as true, whether in law or in fact it was really so or not. The complaint does not allege any hiring of the property, any request for its use, any contract concerning it, any promise to pay any sum for its use, nor that defendant is indebted in any sum to plaintiff, but simply alleges that defendant used the property with permission of plaintiff, that such use was reasonably worth the sum claimed, and that defendant has not paid the same or any part thereof.

This is not sufficient in the matter of personal property. We express no opinion as to whether it would be good for real property, but if it were true of personal property, there is no end to the number of annoying actions which might be instituted and maintained. A person says to another, My horse is in such a stable: any time you would like to ride, go and take him; or, I have such and such books in my library: any time you want them, make use of them; or by permission of plaintiff a person might make use of any other article of personal property; but to say that such use, by such permission, raises an implied contract to pay what such use is worth is not sustained by law. An allegation that defendant hired an article of personal property has been held to imply that the matter was a business transaction, and implied a promise to pay what the use was reasonably worth. *Emery v. Fell*, 2 T. R. 28. But there was no allegation here of hiring, request, contract, indebtedness, or promise to pay. Except on a contract or state of facts which im-

ports a legal liability, a promise by defendant must be averred. Gould's Pl. 73; *Candler v. Rossiter*, 10 Wend. 487.

The demurrer in this case was good, and was properly sustained; but as the court sustained the demurrer on different grounds, the judgment is set aside, as may be done by Compiled Laws, sec. 347, p. 447. An order sustaining the demurrer is affirmed, with the qualification added that plaintiff may have the usual time to amend, to date from the notice given him by the clerk of the district court of the filing in his office of a certified copy of this opinion. All costs to abide the final result.

TWEED, J., concurred.

PORTER, J., concurred except as to the qualification added.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1876.

PEDRO CHARAULEAU v. RICHARD WOFFENDEN.

NO ACKNOWLEDGMENT OF DEED IS NECESSARY TO PASS TITLE to the property conveyed by it.

DEED THOUGH DEFECTIVELY ACKNOWLEDGED, MAY BE GIVEN IN EVIDENCE as against the grantor, or any other party not a purchaser.

WIFE TWENTY-ONE YEARS OF AGE MAY CONVEY HER SEPARATE ESTATE in precisely the same mode that she could if unmarried, and her acknowledgment of a deed does not need to be different in form from that of other persons.

RENTS AND PROFITS OF WIFE'S SEPARATE PROPERTY are her separate property, and if she invests them in the purchase of other property, the property so purchased will be separate property, under her sole and exclusive control.

PRESUMPTION THAT PROPERTY CONVEYED TO WIFE FOR MONEYPED CONSIDERATION is common property, may be overcome by proof that the property was purchased with her separate funds. And for the purpose of showing that such property was her separate property, evidence of the fact that her husband stood by while she was negotiating for its sale, without making any objection to the negotiation, or in any manner questioning her right to the property as her separate property, is admissible in an action brought by the purchaser from her to recover from the husband the property conveyed by her; and so also is evidence that prior to

the conveyance by her the husband had disclaimed any interest in the property.

PRESUMPTION THAT ALL PROPERTY PURCHASED BY WIFE during the existence of the marriage, for a moneyed consideration, is common property, is not applicable to all cases, but the legal presumption as to ownership varies with the different facts and circumstances surrounding each case.

APPEAL from the district court of the first judicial district, Pima county. The facts are stated in the opinion.

Titus & Hughes, for the appellant.

This is an action of ejectment in which the plaintiff was nonsuited.

1. The court erred on the trial of this cause in excluding oral description of the premises in controversy, and in nonsuiting the plaintiff, because the premises referred to in the evidence were not identified as the same described in the complaint. 2 Greenl. Ev., sec. 308; *Jackson v. Vosburgh*, 7 Johns. 186; *McGarvey v. Little*, 15 Cal. 27; *Castro v. Gill*, 5 Id. 40; *Doll v. Feller*, 16 Id. 432.

2. The court erred on the trial of this cause in excluding the deed of Anna C. Woffenden to the plaintiff for the premises in controversy, dated February 11, 1874, because the same was acknowledged before a justice of the peace, and not on examination separate and apart from the husband of the maker, who was a married woman. Comp. Laws, 310, sec. 1; Id. 305, sec. 1; Id. 360, sec. 4; *Miller v. Fisher*, Sup. Ct. A. T., January term, 1875, ante, p. 232; *Elliott v. Osborne*, 1 Cal. 396; *Blood v. Humphrey*, 17 Barb. 660; Abbott's N. Y. Digest, title Acknowledgment of Deeds.

3. The acknowledgment of Anna C. Woffenden, dated November 2, 1875, on her deed made February 11, 1874, if valid in other respects, related back to the making of the deed, and constituted the same competent evidence without further sanction or proof against all but *bona fide* purchasers without notice; and the court erred in ruling otherwise on the trial of this case. *Johnson and Wife v. Stagg*, 2 Johns. 510; *Jackson v. Bard*, 4 Id. 230; S. C., 4 Am. Dec. 267; *Heath v. Ross*, 12 Id. 140; *Stark v. Barrett*, 15 Cal. 361.

4. The court erred on the trial of this case in excluding evidence in answer to the following question: "To

whom was the sale of the ranches in controversy communicated when the same was being made?" which evidence was offered to show that at the time Mrs. Woffenden was negotiating with her nephew, the plaintiff, for the sale of the ranches in controversy, it was made known to the defendant by her, in the presence of the said plaintiff, and the defendant then denied neither her ownership nor the power to sell, but remained entirely silent, and allowed the sale to be consummated and the consideration to be paid without objection. This evidence, it is submitted, was offered to show estoppel. *Snodgrass v. Ricketts*, 13 Cal. 359; *Eply v. Witherow*, 7 Watts, 163; *Wendell v. Rensselaer*, 1 Johns. Cas. 353; Story's Eq. Jur., secs. 1538, 1542; *Demyer v. Souzer*, 6 Wend. 436; *L'Amoureux v. Vischer*, 2 Comst. 278; *Watson's Ex'rs v. McLaren*, 19 Wend. 562; *Weaver v. McKorkle*, 14 Serg. & R. 304; *McMullen v. Wenner*, 16 Id. 18; S. C., 16 Am. Dec. 543; Comp. Laws, 337, sec. 10.

5. The court erred on the trial of this case in excluding evidence that the plaintiff was in the adverse, prior, and notorious possession of the lands in controversy; that the defendant never questioned such possession, but disavowed any interest of his own in the property in controversy, and declared his determination never to return to it. *Morton v. Folger*, 15 Cal. 275; *Slaughter v. Fowler*, 44 Id. 195; *Page v. O'Brien*, 36 Id. 559; *Potter v. Knowles*, 5 Id. 88; *Nagle v. Macy*, 9 Id. 426; *Hicks v. Davis*, 4 Id. 67.

6. The court erred on the trial of this case by excluding evidence that the defendant had abandoned the premises in controversy by leaving the same with an intention never to return to them: folios 54, 55, 57, transcript. *Judson v. Malloy*, 40 Cal. 229; *Bell v. Bed Rock T. & M. Co.*, 36 Id. 214; *Smith v. Cushing*, 41 Id. 97; *Sweeney v. Reilly*, 42 Id. 402; *Moon v. Rollins*, 36 Id. 333; *Davis v. Butler*, 6 Id. 510; *French v. Braintree Man. Co.*, 23 Pick. 216; *McGoon v. Aukeny*, 11 Ill. 558.

7. In the territory of Arizona, since the act of 1871, relating to married women of the age of twenty-one years and upward, all property owned by them before marriage, as well as that acquired afterward, together with the fruits of the same, is separate property, and there is here, therefore,

no such presumption as that any portion of such property or its fruits is common property, nor that the husband is entitled to the control or disposition of the same. Nor are such women, or those who claim through or under them, bound to furnish greater or other evidence of title or ownership than any other parties litigant; and the court erred in ruling otherwise in the present case. Comp. Laws, 310, sec. 1; Id. 305, sec. 1; *Miller v. Fisher*, Sup. Ct. of A. T., January term, 1875, ante, p. 232; *Earl v. Grim*, 1 Johns. Ch. 494; *Philipps v. Chamberlaine*, 4 Ves. 51; *Fox v. Phelps*, 17 Wend. 393; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. 227; *Ladd v. Ladd*, 17 Curt. Cond. Rep. 479; 2 Story's Eq. Jur., secs. 1020, 1369; *Selover v. American R. C. Co.*, 7 Cal. 266; *Magee v. Scott*, 9 Cush. 150; *Lewis v. Johns*, 24 Cal. 98; 1 Greenl. Ev., sec. 74; Comp. Laws, 360, sec. 1.

8. The court erred on the trial of this case in receiving without objection the deeds patent of the United States to Rubledo, Moreno, and Duran for the ranches in controversy, the deed from Robledo to Anna C. Woffenden for the Robledo and Duran ranches, and the deed from Moreno to Anna C. Woffenden for the Moreno ranch, which were offered in evidence to show title in Anna C. Woffenden and her power to convey the same to the plaintiff in the present case, and in assigning to the said deeds the effect by operation in law of showing title in the defendant. Comp. Laws, 360, sec. 1.

9. The court erred on the trial of this cause in excluding evidence of the quantity and value of the crops on the ranches in controversy July 2, 1875, when the defendant took possession of them, on the ground that the documentary evidence above referred to showed the title to be in the said defendant.

Farley & Pomroy, for the respondent.

1. There should be a certificate of the judge or attorneys to the statement that it has been allowed and is correct, or that it has been agreed upon and is correct. Comp. Laws, 437, sec. 343.

2. The statement should have been filed within twenty days after rendition of judgment. *Macomber v. Chamber-*

lain, 8 Cal. 322; *Harper v. Minor*, 27 Id. 115; *Ryan v. Dougherty*, 30 Id. 221.

By Court, TWEED, J.:

This action was ejectment for three quarter-sections of land being in Pinal county, and contiguous to other lands described in the complaint by their legal subdivision, and as being generally known as the Robledo, Moreno, and Duran ranches.

In his complaint the plaintiff alleges that he was seised in fee of the premises on the eleventh day of February, 1874, and while so seised, to wit, on the fifth day of July, 1875, he was ousted by the defendant.

The answer denies that the plaintiff was ever seised of the premises, or was ever entitled to the possession of the same or any part thereof; denies that the defendant entered into the possession of the premises while the plaintiff was so seised as alleged in the complaint; and denies that he unlawfully withheld, or at any other time has withheld, the possession of the premises from the plaintiff; alleges seisin in himself of one quarter-section of the lands on the first of October, 1873, by virtue of a deed of bargain and sale, for the consideration of five hundred dollars, from Abram Moreno and his wife, Mariana Moreno, to Anna C. Woffenden, the wife of the defendant, bearing the date above mentioned; and alleges seisin of the other two quarter-sections on the tenth day of December, 1873, by deed of bargain and sale of that date, for the consideration of twenty-one hundred dollars, from Ygnacio Robledo and Romula Robledo, his wife, to the said wife of the defendant; alleges that the said Anna C. Woffenden was on the first of October, 1873, and on the tenth day of December, 1873, and still was at the date of the answer, the wife of the defendant.

On the trial the plaintiff offered in evidence a deed for the premises from Ana C. Woffenden to the plaintiff, made February 11, 1875, for the consideration of five thousand dollars. Defendant's counsel objected to the admission of the deed on three grounds: 1. That the acknowledgment was defective, having been taken before a justice of the peace, not a proper officer; 2. That it did not contain the declaration required by the statute as to the person sign-

ing the same having been examined separate and apart from and without the hearing of her husband, etc.; 3. That it had not been shown that Anna C. Woffenden had power to convey the premises; that it had been admitted in open court, by plaintiff's counsel, that from August, 1872, the said Anna C. Woffenden had been and then was the wife of the defendant; and that no showing had been made or offered that the premises were her separate property. Those objections were collectively sustained by the court, and the plaintiff excepted to the ruling.

Assuming, for the present, that the premises in controversy were the separate property of the grantor, and passing for the present, also, the question whether any acknowledgment on the part of the grantor of the deed was necessary to entitle it to be received in evidence in the case between the parties, was the acknowledgment defective in having been taken before a justice of the peace? or in that it was not made upon an examination separate and apart from and without the hearing of her husband?

In *Miller v. Fisher*, ante, p. 232, decided at the last term of this court on a hearing had before a full bench, it was held, without dissent on the part of either member of the court, that under the act of 1871 it was not necessary that a contract by a married woman of the age of twenty-one years and upwards, as to her separate property, should be evidenced by a writing signed by her, and acknowledged by her upon an examination separate and apart from her husband, etc.

We are now asked to reconsider the ruling, and adopt the theory that the act of 1871 operated to change the law in this regard to this extent only, that the wife may convey without being *joined* with the husband in the conveyance, but must still acknowledge the execution of the instrument separate and apart, etc., as required by the act of 1865.

One year has passed since the decision in *Miller v. Fisher* was made and published, and important rights have doubtless grown up and vested under the construction which we then gave to the statutes in question. In such a case, the reasons for overruling a former decision should be very clear and conclusive; besides this, unless it very clearly appears that the former ruling was erroneous, the court may properly

consider whether the construction given to the statute by its former decision on the ruling it is now urged to make is most beneficial to the parties whose rights are to be controverted thereby.

Conceding, then, for the present, that there may be reasonable doubts as to the former ruling, does the construction thus given to the statute deprive the wife of any substantial rights, or in any manner make such rights less secure? Does it deprive her of any safeguard in the control or disposition of her separate property, or make less simple and safe the rules for its disposal? In other words, is or was the provision in our statutes requiring this acknowledgment of a contract or conveyance by the wife on an examination separate and apart from her husband, etc., of any practical use whatever? Of course there can be no doubt that under the act of 1871 the wife may convey her separate property by her deed, without being joined by her husband. This she may do without any consultation with or consent from him. To what end, then, having executed a deed for her separate property, should she be required to go before a notary or other officer and make this acknowledgment upon an examination separate and apart from her husband, etc.? If she desires to convey her property, she may do so without his knowledge. If the husband has coerced or overpersuaded her into the execution of the conveyance, and she has been submissive to his will, is she likely to assert her own wishes and make the acknowledgment when in the presence of a notary? If this safeguard, so called, for the wife's interest was ever, under any law for the conveyance of her separate property, of any practical value, which we very much doubt, there can be no doubt that under a law allowing the wife to convey without being joined with her husband, and without his consent or even knowledge, such a provision is a vain thing—a needless, useless requirement, productive of no possible beneficent result.

But the statute, in the Howell code of conveyance, Compiled Laws, 362, 363, section 22, which it is insisted should be taken in connection with the act of 1865, provides, "that upon this examination, separate and apart from the husband, etc., the wife shall be made acquainted with the contents of the conveyance," etc., and it was gravely and earnestly urged

by counsel for respondent that this was an important safeguard to the wife, the presumption of law being that the wife would not know the character of the instrument until so informed by the officer taking the acknowledgment; and it is not without some regret that we admit that there were American authorities cited sustaining the counsel in his position. What is the basis of such a presumption? It must be found, if anywhere, in the supposed ignorance or stupidity of the wife. Before her marriage, if of the age of twenty-one years, and after her husband's death, the law presumes her competent to buy and sell and convey property, and supposes she acts in such matters as intelligently as if she were of the opposite sex; but during the existence of the marriage relation somehow this condition of ignorance and stupidity is supposed to settle down upon her, to benumb her faculties, to cast a cloud upon her intelligence, to be lifted only by the death of her spouse or other severance of the marriage bond.

We are quite sure that the presumption contended for by the counsel for the respondent, that a woman of mature years, and an American wife, ceases from the day of her marriage to know what she is doing in the execution of a conveyance until advised of the contents of the instrument by a notary or other officer, obtains nowhere else than in a court of justice, and should no longer obtain there; and we are equally certain that the legislature of Arizona in enacting the law of 1871, which gives to the wife the sole and exclusive control of her separate property, enabling her to convey the same without being joined by her husband, "as fully and perfectly as if unmarried," did not intend that any such presumption of the wife's ignorance or stupidity should obtain thereafter.

Again, as to the utility of the provision for this acknowledgment of the wife upon an examination separate and apart, etc. It is somewhat remarkable, considering the learning and research which have been bestowed upon the matter, that not a case has been reported, so far as we can discover, wherein it appears that this safeguard, so called, even in a single instance, operated to protect the interest of the wife, or save her from coercion or imposition. We do not remember the citation of such a case, nor have we in our

own experience, nor in our association with the legal profession, known or heard of any case where this provision ever operated as a safeguard to the wife in any respect whatever. Again, while we deem the provision referred to, to be valueless to the wife as a safeguard against the coercion of the husband and impositions from others, the provision is not simply harmless, but has been the occasion of frequent fraud and wrong; for it has often happened that when a wife has joined her husband in a conveyance under laws requiring her to do so, and her acknowledgment has been made to the officer separate and apart as fully and completely in all respects as required by law, and the officer purposely and ignorantly has failed to write the certificate of acknowledgment in the exact form required, the wife, being controlled by the husband, has refused to aid in the correction of the error, and the purchaser is left without a remedy.

It is very safe to say that greater frauds and more injustice have resulted from the requirement of this form of acknowledgment on the part of the wife than would be likely to obtain when the wife's acknowledgment may be taken as in other cases.

Again, the provision if valueless to the wife is not harmless; it treats the wife as an inferior person, especially liable to coercion and imposition, and as being incapable of caring for and guarding her own interests as other sane persons are capable of doing.

If our statutes of 1864 and 1865, which counsel for respondent insists are still in force, are so, and not repealed by the act of 1871, the woman who married yesterday and was possessed of a fortune acquired by her own learning, labor, or skill, can not to-day make a valid sale of a dilapidated sewing-machine without putting the contract in writing, and going before a justice of the supreme court or other officer and acknowledging, upon an examination separate and apart from her husband, *upon being made acquainted with the contents of the instrument* (which she may have written herself), that she executed the same freely and voluntarily, etc.

We will now examine the several acts of our legislature bearing upon the question under consideration, and in the

light of these enactments revise the decision in the case of *Miller v. Fisher*; for if that decision was erroneous, if it clearly appears that the law was not what it was declared to be in that case, the construction we then gave to the statute must be overruled, however beneficial that construction may appear to be to those whose rights and interests are involved in the question.

Section 1, chapter 32, of the rights of married women, Howell's code, reads as follows: "The real and personal estate of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with like effect as if she were unmarried."

Section 2 of chapter 42, Howell's code of conveyances, reads as follows: "A husband and wife may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried."

Section 19, same chapter, reads as follows: "A married woman may convey any of her real estate by any conveyance thereof executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided, by the proper officer taking the acknowledgment."

Section 21, same chapter, reads as follows: "Any officer authorized by this chapter to take the proof or acknowledgment of any conveyance whereby any real estate is conveyed, or may be affected, may take and certify the acknowledgment of a married woman to any such conveyance of real estate."

Section 22, same chapter, reads as follows: "No such acknowledgment shall be taken unless such married woman shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by a credible witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge, on an examination apart from and with-

out the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same."

The next section prescribes merely the form of the certificate of acknowledgment, and need not be quoted. The same chapter designates the officers who may take acknowledgments of deeds in the territory, among whom are notaries public and justices of the peace of the proper county.

In the case of *Miller v. Fisher*, the court overlooked the provisions in the statutes of conveyances contained in the Howell code and quoted above; and regarding the first section, "of the rights of married women," Howell's code, as controlling upon the questions as to what the law was upon the subject in 1864, held that it was the intention of the legislature by the act of 1871 to reinstate married women of the age of twenty-one years and upwards as to their rights to their separate property to the same status in which they stood, as was supposed by the court, under the provisions referred to in the act of 1864, "of the rights of married women."

An attempt was made by the counsel for the respondent to reconcile this section with the several sections of the chapter on conveyances above quoted, but to us the provisions of those two chapters seem irreconcilable. The first section quoted authorizes the wife "to contract, sell, transfer, mortgage, convey, devise, or bequeath her separate property *in the same manner and with the like effect as if she were unmarried.*"

Her conveyance as soon as made would become effectual. The delivering of the deed by her would divest her of all interest in the property without any acknowledgment whatever. Whereas, under the section referred to in the chapter on conveyances of the year 1864, the wife's deed of her separate property would be a nullity until acknowledged as in that statute provided.

Standing alone, and uncontrolled by other provisions, there can be no doubt that under the first section of the act of 1864 a married woman, without being joined by her husband, could convey her separate property in the same man-

ner and without other observances as to forms or acknowledgment than would be required if she were unmarried, and it was so considered by the court in deciding the case of *Miller v. Fisher*, for, as has been already stated, in passing upon that case, the court only looked to this section as controlling the law upon this subject under the original Howell code, overlooking the provisions touching the matter in the chapter on conveyances. But giving effect to the provisions in the last-named chapter, the husband must join in the conveyance, and the manner and form of the conveyance is clogged by the condition of the wife's acknowledgment separate and apart before the deed can become effectual for any purpose whatever.

The Howell code was prepared in great haste immediately after the organization of the territory, and acted upon at the first session of our legislature, and there was little time for careful consideration of the provisions of the statutes of other states which were incorporated into the code, and it is not derogating from the just praise to which its author and the legislature are fairly entitled to say there was much that was incongruous and unsystematized in its provisions.

We have quoted the statutes bearing upon the subject of the wife's acknowledgment as they stood at the adjournment of the session of the legislature of 1864. In 1865 an act was passed, the first section of which reads as follows: "All property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest; devise, or descent, shall be his separate property."

The second section of the same act provides, "that all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

The third, fourth, and fifth sections of the same act provide for inventory and registration of the separate property of the wife; and the sixth section, from the operation of which, in *Miller v. Fisher*, we held married women of the age of twenty-one years and upwards exempt as to this

acknowledgment by force of this act of 1871, reads as follows: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage, but no sale or alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from her husband, before a justice of the supreme court, probate judge, or notary public, or if executed out of the territory, then acknowledged before some judge of a court of record, or before a commissioner appointed under the authority of this territory to take acknowledgment of deeds."

It will be observed that this section does not provide that the wife shall be "made acquainted with the contents of the instrument" she is executing, nor that she shall acknowledge upon an examination, separate and apart, that she executed the same "freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same," as provided in the act of 1864, on conveyances; but the observance of these requirements of the last-mentioned act was probably contemplated by section 6 of the act of 1865, now under consideration.

We have set out the several enactments bearing upon the question we are considering up to the time of the passage of the act of 1871. That act is in these words:

"Section 1. Married women of the age of twenty-one years and upward shall have the sole and exclusive control of their separate property, and may convey and transfer lands or any estate or interest therein, *vested in* or held by them in their own right, and without being joined by the husband in conveyance, as fully and perfectly as they might do if unmarried.

"Section 2. All acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed."

It was under this act, with its repealing clause, that this court held, in the case of *Miller v. Fisher*, the provisions of the sixth section of the act of 1865, and all former provisions upon the subject under consideration, inoperative as to married women of the age of twenty-one years and upwards.

It is true that in that case the question before the court was as to the right of a married woman to make a conveyance of her separate personal property without a writing so acknowledged, etc. But the section referred to in the act of 1865 includes "all the separate property of the wife," and provides that no sale or other alienation of *any part of such property* shall be made, except by such writing so acknowledged, etc. Upon the argument in that case, and we think in the brief of the counsel for the respondent therein, the attention of the court was called to some of the leading authorities cited by the counsel for the respondent in this, and the same positions insisted upon which are now urged, that the act of 1871 only operated to repeal the provisions of section 6 of the act of 1865, so far as it required that the wife should be joined by her husband in the conveyance, etc., and yet the court were unanimously of the opinion that the provisions in that section touching the acknowledgment of married women of the age of twenty-one years and upward were swept away by the act of 1871.

And as the court then held, the majority of the court now hold, that by the act of 1871 the legislature, in providing that a married woman's separate property should no longer be left to the management of her husband, but should be under her own sole and exclusive control, and that she might convey and transfer the same as fully and perfectly as if unmarried, intended in all respects to place the wife of the age of twenty-one years in precisely the same attitude, as to the conveyance of her property, as if she were a *feme sole*; that she should no longer be hampered with conditions and provisions in the transfer and conveyance of her separate property which are not imposed upon unmarried women.

Among all the rules for the construction of statutes, so liberally quoted by the respondent's counsel, no one is more likely to lead to a true interpretation of the intention of the legislature in an enactment than that of giving to its language and scope the meaning it would convey to the common mind.

It was upon such a reading of this act of 1871 that this court held that the acknowledgment separate and apart, etc., by the wife as to her separate property, was no longer necessary to her conveyance thereof. The act was certainly

calculated to mislead those acting under it, if it is to be construed as requiring any other act, or the observance of any other formula, on the part of a married woman than is required of an unmarried one.

We think it clear that the legislature intended by the act just what any person of ordinary intelligence would understand by it, and would receive and adopt as its obvious meaning; and we have no doubt that the common understanding of intelligent persons as to the meaning of the act would be in precise accordance with the construction we gave to it in *Miller v. Fisher*.

Again, had the act been intended in this regard only to relieve married women from being joined in a conveyance of their separate property by their husbands, and not to extend further, it seems to us the legislature would have used other terms than those with which the section concludes, and would have said "as fully and perfectly as if so joined," rather than the terms, "as fully and perfectly as they might do if unmarried." Certainly such a wording of the statute would make the construction given to it by the counsel for the respondent much more plausible than the terms therein used, but the counsel for the respondent insists that the requirement as to the acknowledgment contained in section 6 of the act of 1865 does not operate as a hindrance or obstruction to the perfect freedom of the wife in conveying her property; that the requirement has to do with the *mode* only, and that not in such a way as to prevent her from conveying as fully and perfectly as if unmarried.

Is this so? Unnecessary machinery impedes and is an obstruction in the prosecution of any work, and every useless formula, the observance of which is required in the transaction of affairs, is a limitation upon the freedom exercised in the performance of the act, and that the requirements of this section of this acknowledgment does not leave the wife to convey as fully and perfectly as if she were unmarried, seems to us very clear.

In fact the wife can not convey perfectly where such an acknowledgment is required; without the certificate of the officer, she can not convey at all. "No sale or other alienation of any part of such property can be made," etc., without this writing and acknowledgment, is the language

of the act of 1865. That of 1871 is, that she may convey as fully and perfectly as if unmarried. To illustrate: Jane, a married woman, and Sarah, unmarried, each own a lot in Tucson; they both sell to a purchaser, who waits upon them while they write the deed; each writes the deed for the lot she intends to convey; each signs and seals her deed, and in the same manner; and each delivers her deed to the purchaser, and demands the contract price for the property. The purchaser hands the price of the property to Sarah, but says to Jane, This is not your deed, nor can it become so until you go before a notary or other officer, get him to inform you of the contents of the deed you have just written, make an acknowledgment on an examination separate and apart from your husband, etc., and then if the certificate of the officer is in proper form your conveyance will be complete, and you will be entitled to the purchase money.

Each has executed and delivered her deed in the same manner, and the act of 1871 provides that the married woman may by herself, without being joined by her husband, convey as fully and perfectly as if unmarried; and yet, while the deed from Sarah has passed the title to the purchaser, that from Jane is wholly without effect until she and an officer have done something not necessary to be done to give effect to Sarah's deed.

Again, the bad uses to which the cumbersome machinery of this requirement is put could hardly be more apparent than in the case before us, where the husband seeks to defeat the wife's deed—a deed which it is very clear he would never have moved her to make, and one made wholly against his wishes—by setting up that she has not, by any acknowledgment made upon an examination separate and apart from himself, shown that he himself has not coerced or even persuaded her to execute it.

We conclude this branch of the case by adhering to the ruling made in *Miller v. Fisher*, believing the act of 1871 is and was intended by the legislature to be a complete enfranchisement of the wife in the control or conveyance of her separate property from every badge of infirmity or serfdom, and relieving her from all humiliating conditions in regard thereto not imposed upon other persons.

This acknowledgment, then, separate and apart, etc., not being regarded in the conveyance of the separate property of the wife, it follows that no acknowledgment of the deed was necessary to entitle it to be received in evidence in this case (the defendant not being a purchaser), if it sufficiently appeared that the property intended to be conveyed was the separate property of Anna C. Woffenden.

What constitutes, then, the separate property of the wife under the act of 1871, taking into consideration the act of 1865?

The act of 1865, already quoted, so far as it affects this question, provides, that "all property, real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property."

The same act provides that the husband shall have the management of the wife's separate property, and that the rents and profits of the separate estate of either husband or wife shall be common property, and that the husband shall have the entire management and control of the common property, with absolute power to dispose of the same, as of his own separate estate.

The act of 1871 gives the sole and exclusive control of her separate estate to her if she be of the age of twenty-one years, with the right of disposing of the same free from any influence of and without the consent of her husband. This sole and exclusive right of control by the wife of her separate property is wholly inconsistent with the rights of the husband to the rents and profits. Of what value to the wife would be the right to control and convey if upon the lease or conveyance the rent on one hand and the purchase money upon the other became at once community funds under the absolute control of the husband?

By the fourteenth section of article 11 of the constitution of California it is provided, that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property."

By an act of the legislature of that state, regulating the relation of husband and wife, it was enacted: "The husband shall have the entire management and control of all the com-

mon property with the like absolute powers of disposition as of his own separate estate, and the rents and profits of the separate estate of either husband or wife shall be deemed common property," etc.

Upon a question as to the constitutionality of this enactment, raised in the case of *George v. Ransom*, 15 Cal. 322, the court uses the following language: "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of the right of the property in one, divested of all beneficial use—the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband; but this object would wholly fail in many instances if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in a contingency of her surviving her husband."

The court further says: "The common law recognized no such solecism as a right in the wife to the estate, and a right in some one else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property can be in one, in full and separate ownership, with a right in another to control it and enjoy all of its benefits. The sole value of property is in its use; to dissociate the right of property from the use in this class of cases would be to preserve the name, the mere shadow, and destroy the thing itself, the substance. It would be to make the wife the trustee for the husband, holding the legal title while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the life-time of the wife than for all time."

The act of 1865, as has been seen, which prescribes what property shall be the separate property of the wife, contains also the antagonistic provision that the husband shall have the management thereof, and of the rents and profits of the same. The act of 1871 repeals these antagonistic provisions by giving to the wife the sole and exclusive control of her separate property, which carries with it the right to use and

invest the fruits thereof. Under the law of 1865, whatever of fortune belonged to the wife at her marriage or came to her in any manner afterwards, either as the fruits of her separate property or otherwise, was taken wholly from her use and control and given to the sole management of the husband; she might have been possessed, before her marriage, of ample means to supply her wants and gratify her tastes free from the control of any one, but on the day of her marriage and by the act of marriage, she is divested of the right to use one dollar's worth of this property *as her own*. It makes no difference what the kind and character of the property may be. If she had a carriage, it is no longer her own; she may not even use it except by leave of her husband; if she have money, the husband may demand and take possession of it, doling it out to her, if at all, in such pittance as to make her keenly sensible of her condition of serfdom. This was the law of 1865, and these the conditions to which every woman in Arizona had to submit in contracting marriage under it.

We are advised by recent decisions of the United States courts of the effect of the decree of confiscation of the property of those recently in rebellion against the government, and understand the effect of such a decree of confiscation to be wholly to deprive the offender of all right to use and control or in any manner interfere with the property confiscated in his life-time, though at his death it may pass to his heirs.

Under the act of 1865, as it stood before the enactment of 1871, the wife, possessed of a fortune on the day of her marriage, by entering into this relation lost as wholly and completely all right to the use and enjoyment of her separate property as if the same had been confiscated for rebellion against the government. The decree of confiscation in the one case, and bride's marriage certificate in the other, would operate alike, and take from rebel and matron with admirable completeness and impartiality all right to use, appropriate, and enjoy the least even of the treasures owned and held by them when either entered into matrimony on the one hand, or committed an act of rebellion on the other. It seems to us the penalty, so to speak, imposed by the law of

1865 upon women for entering into the marriage relation was unnecessarily severe.

It was to get rid of these obnoxious provisions that the act of 1871 was passed. The law as it stood before that act was passed, instead of fostering and encouraging marriages, was framed as if for the very purpose of preventing women possessed of property from entering upon this relation; the more enlightened legislation of 1871 says to every woman contracting marriage in our territory, You shall have the sole and exclusive use and control of your separate property, and may bestow, convey, and transfer the same when and how you will, as fully and perfectly as if unmarried.

We think the act of 1871 adds to the methods by which the wife may obtain separate property. That instead of being confined to several methods of gifts, bequest, devises, and descent, she may add to her separate property by purchase, that she may use the rents and profits of her separate property by investing them in the purchase of other property, lands, or personal property, and that such property when so purchased is not *acquired* in the sense in which that word is used in the first section of the act of 1865.

We conclude, then, that the wife, of the age of twenty-one years, in addition to the property owned by her at her marriage, and in addition to that afterwards acquired by gift, bequest, devise, or descent, may acquire property, real or personal, by *purchase* if the purchase money be of the separate funds of the wife, and that the rents and profits of her separate property are her separate funds. In another case now before us we may consider this matter more fully.

The fact, then, that the property intended to be conveyed by the deed offered in evidence was granted to Anna C. Woffenden for a moneyed consideration is not conclusive that the property was common property, for if the moneyed consideration was of her own separate funds, had and owned by her before marriage, or received by way of rents and profits from her separate property after marriage, the property was her *separate property*, and under her sole and exclusive control.

We pass the question as to the presumption that all property conveyed to the wife for a moneyed consideration is common property, as necessarily involved in this case, if it

appears, as we think it does, from the transcript that evidence was offered and ruled out which would go strongly to support the theory that the property was the separate property of Anna C. Woffenden at the time of the conveyance by her to the plaintiff and appellant herein; for admitting the legal presumption to be as above stated, such presumption may be rebutted and overcome by proof that the property was purchased with the separate funds of the wife.

It is, however, insisted by counsel for the respondent that no evidence was offered by the plaintiff showing or tending to show that the property in controversy was the separate property of Anna C. Woffenden.

Passing the question as to the order in which this proof should have been offered, was such evidence offered at all?

On the examination of the witness Charauleau (see folio 43 of transcript), the witness was asked: "To whom was the sale of the ranches communicated when the same was being made by deed?"

The witness answered and reads: "The offer upon the question. The deed that when the sale was made by Anna C. Woffenden to the jury, the plaintiff of the ranches in contest, the defendant informed of it by her in presence of the plaintiff and the defendant did not then question Mrs. Woffenden's ownership, her right to dispose of the property in question, but allowed the contract to proceed, and the consideration of five thousand dollars to be paid, without any question or objection."

The court ruled that there was no deed in evidence, and inquired of the plaintiff's counsel what he meant by sale. Counsel answered "that he meant a contract for the conveyance of the property in controversy, to be consummated, as it afterwards was, by deed." We understand from the transcript, as above quoted, that upon putting the question to the witness, the plaintiff's counsel offered to prove by the witness the matters set out, in substance—that while negotiations were in progress between Mrs. Woffenden and Charauleau for the sale of the ranches the defendant was present, that she was treating the ranches as her separate property, and the defendant in no manner questioned her right so to do, but permitted the negotiation to go on and the plaintiff herein to pay the purchase money, etc.

As we understand from the transcript, the court not only sustained the objection made by the defendant's counsel to the question put as leading, but also ruled the evidence offered should be excluded; that is, the court would not permit the plaintiff to prove by the witness the matter he offered to prove, had there been no objection to the form of the question.

We have no doubt that in this the court erred; the offer was not by oral testimony to establish and prove a contract for the conveyance of lands, it was to show that the property being negotiated was the wife's separate property, as evidenced by the conduct of her husband while she was negotiating the sale thereof, and treating it as her own.

Giving full force to the legal presumption contended for by the counsel for the respondent, that the property was common property, it might still be shown to be the wife's separate property; for though obtained by acts of her separate grant for a moneyed consideration, if this moneyed base of other ion was of her separate funds, the property was that such pr separate property.

Now, when she was so negotiating a sale act of 1865, party, bargaining it for a price, with the view of twenty g it, would not the fact that the husband was pre her at her head no objection to the negotiation, nor in an equired : questioned her right to the property as her separate property, be evidence strongly tending to show that the property was her separate property and obtained by her separate funds? The title of the property vested in her by virtue of the deeds from her grantors if the purchase money was of her own funds; if not, then the property became common property. The evidence offered was to show that the defendant himself being present assented to her treating the property as her separate property, which it is assumed he would not have done had the property been purchased with his separate funds or with the common fund.

Again, the plaintiff offered to prove by the witness Wise (see transcript, folio 57), that the defendant in 1874 "disclaimed in the witness's presence any interest in the ranches in controversy, and expressed his determination never to return to them." The deed from Abram Moreno and Mariana Moreno, his wife, and from Ygnacio Robledo and

Romula Robledo, his wife, conveyed the title of the property to Anna C. Woffenden to vest in her as her separate property if purchased by her separate funds, otherwise to become common property. If it was common property, the defendant certainly had an interest in it. Was not his disclaimer of any interest in the property evidence tending to show that the property was the separate property of the wife? The husband has control of the common property, and if these lands had been purchased with means from the common fund, would he not have known it, and would he have disclaimed any interest in them?

Had the defendant paid for the property out of his own means, or out of the common funds, would he be likely to make such disclaimer? At any rate, such disclaimer was proper evidence to go to the jury as tending to show that the property was the separate property of the wife.

It would have been more regular for the plaintiff, when offering the deed from Anna C. Woffenden in evidence, to have offered in connection therewith the evidence above referred to. The deed and this evidence should then have gone to the jury, under instruction from the court to the effect that if the evidence satisfied them that the property was purchased by the separate funds of the wife, it was her separate property, and that the deed was sufficient to convey the same.

This evidence was a sufficient predicate for the introduction of the deed, and probably the deed would have been offered after this evidence was offered and ruled out, had not the court excluded the deed on the ground that the certificate of acknowledgment was defective. It is apparent that the court held that the deed, even with this evidence, could not properly be admitted to go to the jury. We think both should have been received under instructions as above indicated.

We have considered this case upon the hypothesis that it is the presumption of law that all property acquired by either spouse after marriage, otherwise than by gift, bequest, devise, or descent, is common property; but while we have so considered the matter in this case, we would not be understood as adopting the correctness of this presumption stated as broadly as it is in the authorities cited. The current of

the authorities cited, principally from California reports, is to the effect that *all* acquisitions by either spouse for a moneyed consideration, during the existence of the marriage, is presumptively common property. It seems to us that there are grave objections to the rule as stated in these authorities. A legal presumption should certainly accord with the probable fact. Common property, under our law, can only accumulate after marriage, and if either spouse who married yesterday to-day purchases and pays for property of the value of ten thousand dollars, could the presumption arise that the property is common property? Would it not, on the other hand, appear certain that the property so purchased was not common property, that it must have been paid for by the separate funds of one or the other? And under the authorities referred to, if so paid for by the separate funds of either spouse, it would become the separate property of such spouse.

It appears to us that no presumption can arise like that referred to, applicable to all cases, as is assumed by the authorities referred to, but that the legal presumption as to ownership would vary with the different facts and circumstances surrounding each case.

It follows from the conclusions at which we have arrived, that the judgment of nonsuit herein must be set aside and the case remanded for a new trial, and it is so ordered.

PORTER, J., concurred.

DUNNE, C. J., delivered the following dissenting opinion:
I dissent from the judgment. At the close of this term there was a change in the organization of the court—a newly appointed member of the court was daily expected to arrive. It was not known how soon he would come, nor how soon the opinions of the court could be prepared and filed. It was deemed advisable by the majority of the court to enter the judgments in the last few cases heard, and allow the opinions to be filed afterwards. As I am the judge who is retired, I am obliged to write my opinion without having before me the opinion of the majority of the court. I can not, therefore, say how far I dissent from the opinion of the court; and not knowing on what reason the majority of the court will ground their decision, I must, at the risk of being prolix, review all

the grounds of error assigned, and express my opinion on each one separately. I will first notice the preliminary objection made by respondent as to the lack of authentication of the statement.

Rule 12 of this court reads as follows: "Exceptions to the transcript, statement, the bond or undertaking on appeal, or to the notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the rights of the appellant to be heard on the points of error assigned must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the court before the argument on the merits."

This case was set for argument for January —. On that day court opened, but without calling any case or in any way considering this or any other case, adjourned of its own motion until January —. On January — court opened pursuant to adjournment and called this case for argument. Respondent, before proceeding to this argument on the merits, produced a preliminary objection to the transcript, noted in writing, filed the day before the argument, and showed proof of service of same on counsel for appellant the day before the argument. Counsel for appellant opposed the hearing of the motion, arguing that it ought to have been noted the day before the day set for the argument of the case and not the day before the actual argument; and the majority of the court refused to hear the preliminary objection of respondent, on the ground that it had not been noted in time, to which ruling I dissented. Believing, therefore, that the objection ought to have been heard, I will consider it. The objection was that the statement in the transcript was not properly authenticated, and should therefore not be regarded by the court.

The provisions concerning authentication of statements are settled by our statute, Comp. Laws, sec. 343, p. 437, as follows: "The statement, when settled by the judge, shall be signed by him, with the certificate that the same has been allowed and is correct. When the statement is agreed upon by the parties, they or their attorneys shall sign the same, with their certificate that it has been agreed upon by them and

is correct. In either case, when settled and agreed upon, it shall be filed with the clerk."

In this it appears that the signature alone of the judge or the attorneys is not sufficient, but there shall also be a certificate that the statement is allowed or "has been agreed upon by them and is correct."

The whole case in the appellate court often turns upon the facts set up in the statement. It is, in such instance, upon those facts that the whole action of the court is based. The statute explicitly provides that there shall be clear and express proof of the truth of the statement. The mere signature of the judge to the statement is not sufficient. He must formally certify that he has allowed the statement, and that it is correct. So the mere signature of the attorneys is not sufficient. There must also be a certificate stating that they have agreed to the statement, and that it is correct. In this case there is no such certificate, nor any attempt at any certificate whatever. At the foot of the statement appear the names of the attorneys: nothing more. They certify to nothing. If the statute said merely that the statement should be attested by the judge, the parties, or their attorneys, a mere signature would doubtless be sufficient; but where the statute expressly states that there shall be a certificate, and declares what that certificate shall state, I do not think that it is a reasonable compliance with the statute to omit the certificate altogether. I am of opinion, therefore, that a statement so presented is not entitled to the notice of this court, and that this appeal stands upon the judgment roll alone. In that no error appears, and the judgment should therefore be affirmed.

2. Accepting, however, for the purposes of this opinion, that the unauthenticated statement embodied is true, the following appears: This was an action in ejectment. Plaintiff alleged seisin in fee of the premises in controversy on the eleventh of February, 1874; that the defendant entered thereon July 5, 1875, while plaintiff was so seised, and withholds to plaintiff's damage, in the sum of ten thousand dollars; and that the value of the rents and profits during such withholding is two hundred and fifty dollars per month. Defendant denies that plaintiff was ever seised or entitled to the possession of said premises; denies damages, and

alleges that he is the legal owner of said premises, and in possession thereof, stating his title; that plaintiff claims title from defendant's wife by deed, she having no power to sell; that said deed was made to defraud the defendant, and that plaintiff knew thereof and prays cancellation of said deed.

It was established on the trial by plaintiff's evidence that Anna C. Woffenden, from whom plaintiff claimed to have purchased the lands sued for, was from August, 1872, ever since has been, and now is the wife of the defendant; that the title to these premises stood in her name; that this title consisted of patents from the United States to her grantors and deeds of purchase from them to her for a moneyed consideration, made during her coverture; and that the only documentary title plaintiff claimed was a conveyance from her alone to plaintiff, made during such coverture. The first error assigned is as to action, shown at folio 40 of transcript. Plaintiff opened his case by taking the stand himself, as the first witness in his own behalf.

The first relevant evidence offered was that plaintiff was asked "to describe the whole property bought by him of Anna C. Woffenden, lands and all." Objected to as inadmissible, because: 1. No foundation laid for oral description of lands purchased, no proof of purchase itself having been made; 2. Evidence offered incompetent to prove purchase; should be in writing; no foundation to prove contents of lost writing. Objection sustained. The ruling on this objection was immaterial, as will appear in the consideration of the fifth assignment of error.

The second assignment of error is as to action, at folio 42. Plaintiff offered in evidence deed to himself of premises from Anna C. Woffenden. Objected to: 1. Defective acknowledgment; 2. That it has not been shown that the person executing said deed had power to convey the premises described therein. Objection sustained.

Here was an objection to the order of proof. Merely proving a conveyance to plaintiff in ejectment is nothing unless plaintiff shows that the person conveying had power to convey the legal title. Otherwise the court might be delayed for days at any time, and the record uselessly incumbered by the introduction of irrelevant conveyances. The court has the right to protect itself against such a practice.

Therefore the order of testimony has been left to the discretion of the court. No abuse of this discretion is shown.

It is not shown that plaintiff offered any reason for not introducing the requisite preliminary evidence at that time, nor that he assured the court he would subsequently produce it. There was no error, therefore, in excluding the deed at that time, the ruling as to the acknowledgment being immaterial, the deed itself being properly excluded on other grounds. The third assignment of error is for action, commencing at folio 43½.

Plaintiff, testifying in his own behalf, being asked on direct examination, "To whom was the sale of the ranches communicated when the same was being made?" offered to show that defendant, the husband, knew of the sale being made by his wife, and said nothing. Objected to as: 1. Leading; 2. Inadmissible, no proof of negotiations; 3. Incompetent, as oral, to prove agreement of sale; 4. Immaterial, no power in wife to sell having been shown, and this being incompetent evidence to show such power. Sustained. The evidence was immaterial. Granting it proved all that was claimed—that it proved that the husband stood by and saw his wife agree to sell real estate of common property—the most it would show would be equitable title in plaintiff, not sufficient to recover upon in ejectment against the holder of the legal title in possession. If it was separate property of the wife which she might sell without her husband's consent, as she could do here if it were separate property, then his knowledge or assent was also immaterial. It must have been either common or separate, and therefore the evidence was immaterial in either case, and was properly excluded.

The fourth assignment of error was in action, declared at folio 47½. "Plaintiff's counsel again offered in evidence the deed of Anna C. Woffenden to the plaintiff for the property in controversy, with an acknowledgment of that date, November 2, 1875." The action was begun September 6, 1875. An acknowledgment taken after commencement of the action, taken on the trial of the cause, is immaterial to show title in plaintiff at the commencement of the action. None of the other objections sustained to the deed on its first offer had been cured in the mean time. The only additional reason shown for the introduction of the deed was this sub-

sequent acknowledgment, and that was of no benefit to plaintiff in this action.

Before any other action was had which is assigned as error, the plaintiff introduced without objection patents from the United States for the premises in controversy to the grantors of defendant's wife, and deeds of purchase from them for a moneyed consideration to defendant's wife during her coverture. Plaintiff stated the object of this introduction to be as follows: "These deeds were offered in evidence to show that Mrs. Woffenden, at the date of the deed to plaintiff, was the absolute owner of the premises in controversy, and also to show her power to convey to the plaintiff." Folio 52.

The granting clauses in said conveyance to the wife are to her and her heirs and assigns. There is no *habendum* clause in either of them. In neither of them is there anything said at all in any way as to her having or receiving the premises, or any part thereof, as separate property.

The next and fifth assignment of error is as follows: "In excluding evidence that the plaintiff in this case was in the adverse, prior, and notorious possession of the real property in controversy; that the defendant never questioned the plaintiff's right of possession, but disavowed any interest of his own in said property, and declared his intention never to return it."

This evidence was offered after the admission of the documentary title last before described, showing title in the wife of the defendant from the United States by deeds of purchase during coverture, and which, the transcript says, though received, were not admitted by the court as proving power in the wife to convey to the plaintiff. To this offer, now made, to prove that plaintiff was in adverse, prior, and notorious possession of the premises, defendant objected: 1. That the evidence is inadmissible because title by adverse possession must be specifically pleaded, and must have continued five years in order to give the possessor title against the party holding the legal title, it appearing that the legal title is in the defendant; 2. That the offer does not claim to cover the period of five years, and is, therefore, incompetent to prove title by adverse possession; 3. That under the evidence already admitted in this case, title by adverse possession can not be shown, since plaintiff has already

shown, by the documentary evidence of title before alluded to, that the legal title is in the defendant from the United States government, than which no title can be prior. Objection sustained.

To that portion of the offer proposing to prove abandonment by acts and declarations of defendant, defendant objected, that the testimony offered was incompetent to prove title in the plaintiff or to prove abandonment by defendant, it having been shown that the legal title was in defendant by patent from the United States. Objection sustained.

The answer to all these points in the fifth assignment of error, as also to the first assignment, is, that the plaintiff himself proved that the legal title was in the defendant, under patents from the United States issued about eighteen months prior to the commencement of the suit. That such was the legal effect of plaintiff's proof, I will now discuss. But that such being the legal effect of plaintiff's proof it could be material to permit plaintiff to describe the lands, or to contradict his own testimony by attempting to prove prior or adverse possession to sustain an action in ejectment against such a defendant with such title, I will not discuss.

Plaintiff proved patents from the United States, for the premises in controversy, to the grantors of defendant's wife, and conveyances from them to her for a moneyed consideration, during her coverture. What is the legal effect of such a proof? Did the property become the separate property of the wife by such conveyances? or does the law presume it to be the common property of both husband and wife? Our statute on the subject is as follows: "Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." Comp. Laws, 306.

Under a similar law in California, the courts have held that all property acquired by either spouse during the marriage by purchase is *presumed* to be common property, and that this presumption can be overcome only by clear and satisfactory proof that it was acquired by the separate funds of one or the other, and that the burden of proof lies on the party claiming the property as separate. *Smith v. Smith*,

12 Cal. 224, opinion by Judge Field, who cites a great many cases in support of that declaration. This doctrine is confirmed and adhered to in California, in *Meyer v. Kinzer*, 12 Id. 247; *Pixley v. Huggins*, 15 Id. 127; *Mott v. Smith*, 16 Id. 533; *Burton v. Lies*, 21 Id. 87; *Adams v. Knowlton*, 22 Id. 283; *Riley v. Pehl*, 23 Id. 71; *McDonald v. Badger*, Id. 393. I believe that to be the true rule in the matter.

Plaintiff offered no proof whatever to overcome this presumption, although his attention was specially called to this defect of proof by the objection made as to the order of testimony. The conveyances themselves contain no word which shows any intention to pass the property to her as her separate property. There is no proof in the case that she ever owned any separate property, or ever had any rents or profits of any separate property. There was nothing on which to found any inference that it was in any way possible that these premises might be her separate property, beyond the naked fact of her taking the property by a deed of purchase; in which case the presumption stands that it is common property until overcome by clear and satisfactory proof to the contrary. In the territory, it is not necessary for the wife to join in a deed for common property. She has no control over it whatever. A conveyance from her alone can in no case pass any legal title. Therefore, as against this defendant in ejectment, the deed was properly excluded. If the deed from defendant's wife to plaintiff was properly excluded on the ground that she had no power to convey the premises, they being common property, then it is immaterial what other and further objections to it were sustained by the court.

If one good objection was made and sustained, it does not matter whether the other objections were good or not. If only one insuperable objection to the admission of the deed was made, and remained unremoved, the exclusion of the deed can not have been error. Admit, for the argument, that all the other objections to the deed were bad, and that all the rulings in those other objections were wrong, the plaintiff was not injured thereby, because the result would have still been the same, the deed must still have been excluded for lack of power in the wife to convey common property. It is urged, *arguendo*, that the objection that the

acknowledgment of the deed was defective, having been sustained, it was useless for the plaintiff to prove power in the wife to convey, as the deed would still have been excluded. The transcript does not show on which of the two grounds of objections urged (*viz.*, 1. Defective acknowledgment; 2. Defect of power to convey) the deed was excluded. But plaintiff afterwards tried to meet the objection as to defective acknowledgment by getting a new acknowledgment of the deed, but he did not try to cure the other defect, *viz.*, a failure to show power to convey. It is immaterial whether he cured the first defect or not, so long as he left the second fatal defect uncured.

It is true that if the plaintiff had cured the second defect, the court might still have excluded the deed on account of the acknowledgment; but had the second been cured, and had the court still excluded the deed because of the acknowledgment, then, if that were error, it would be material; but with that second defect of lack of power to convey left uncured, the ruling of the court, so far as it affected the matter of the acknowledgment, is entirely immaterial.

The sixth and last assignment of error is that the court erred in nonsuiting plaintiff. When plaintiff rested his case, his proof stood as above described, *viz.*, legal title in the defendant. When a plaintiff shows this in ejectment, under a complaint relying solely on seisin in fee, and no offer to amend having been made, all of which is the case here, he must be nonsuited. I am therefore of opinion that the judgment of nonsuit ought to be affirmed.

THOMAS GRAVES *v.* JOHN T. ALSAP.

PARTIES TO ACTION CAN NOT STIPULATE WHAT THE LAW IS that is to govern their case; nor can they stipulate what the action of a law-making body was in a given case, and from the stipulation thus made ask the court to determine whether a general law is or is not in force.

JOURNALS OF LEGISLATIVE BODY ARE NOT EVIDENCE TO THE COURTS as to what laws were enacted by such body, and, in the absence of other evidence, a court is not warranted in finding that a general act has been passed by such legislative body, where such act has not been published amongst the laws, and no copy of it can be found enrolled in the office of the secretary of the territory, who is the lawful custodian of all original bills that have been properly passed.

APPEAL from the district court of the third judicial district, Maricopa county. The facts are stated in the opinion.

G. H. Oury, for the appellant.

All the facts upon which this action is based are stipulated, and come up in the transcript. The law relied on in support of and applicable to this case is as follows: By a law of congress in force on the first day of December, 1873, and which continued in force until the eighteenth day of February, 1875, the power or right was conferred on the legislature of Arizona to pass any act or law over the veto power of the governor, by means of a vote of two thirds of the members of each house. R. S., sec. 1842, p. 327; *Id.*, sec. 5595, p. 1091.

The legislature of the territory of Arizona, on the twelfth day of February, 1875, passed a law making the office of judge of the probate court in the several counties in the territory of Arizona elective, which said law was passed over the veto power of the governor by a vote of two thirds of the members of each house of the legislative assembly. Certified copy of act of twelfth of February, 1875.

No inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular act is placed. R. S., sec. 5600, p. 1091.

The grant of the power or right of the legislature of Arizona to pass any act over the veto power of the governor was accepted and acted upon prior to the eighteenth day of February, 1875, and the right of the people of the territory to elect judges of the probate courts became vested, and can not be disturbed. *Ogden v. Blackedge*, 2 Cranch, 272.

The act of congress of the eighteenth of February, 1875, is not retrospective in terms, and can not be so construed. R. S., p. 1435. A statute, when no other time is fixed, takes effect from date. 1 Kent's Com. 455, 458. The title of an act and the preamble to an act are no parts of it. *Id.* 461.

Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in its operations, and opposed to

sound principles of jurisprudence. Broom's Leg. Max. 34. A statute shall not be construed retrospectively to affect a vested right, unless it specifically refer to a particular case, or is clothed in words that can have no other meaning unless such a construction is adopted. Id. 36, 37. Whenever it is possible to construe an act not retrospective, the courts will always adopt that construction. Id. 40.

Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and unjust. *Calder v. Bull*, 3 Dall. 386. It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing; to give that effect, the statute should declare in terms an intention so to act. Statutes should be construed prospectively. *Thorne v. San Francisco*, 4 Cal. 133, 139; *Quackenbush v. Danks*, 1 Denio, 130. Even with regard to statutes affecting only political regulation or convenience, the rule of construction does not vary. *McIlvaine v. Coxe*, 2 Cranch, 280.

There is no doubt at this day, that the established rule of construction adopted in the United States and in England is that statutes shall operate prospectively; the spirit and genius of our institutions imperatively demand this construction. *Dash v. Van Kleeck*, 7 Johns. 477; S. C., 5 Am. Dec. 291.

Prior to the first day of December, 1873, the governor of Arizona was vested with absolute veto. Comp. Laws, p. 15, sec. 3. The laws of Arizona are in force until disapproved by congress. Id., p. 16, sec. 7.

J. T. Alsap, for the respondent.

The first error assigned by appellant is the conclusion of law by the court, as follows: "The action of the legislature upon the bill mentioned, subsequent to its return by the governor without his approval, was without authority of law and was void." The action of the legislature referred to was that of again considering the bill after its return by the governor without his approval.

The respondent contends that section 1842 of the revised statutes of the United States, which is relied upon by the appellant, was amended, and was controlled by the amendment of said section as found in section 1 of an act

entitled "An act to correct errors and to supply omissions in the revised statutes of the United States." Both the original act and the amendment purport to show what the laws of the United States, of a general nature, were on the first day of December, 1873. If the law of the revised statutes, as amended by the amending act, was the law on the first day of December, 1873, then the action of the legislature of Arizona on the twelfth day of February, 1875, in again considering a bill after the governor had returned it without his approval, was void. That it was the intention of congress to make both the original act and the amendment take effect from the first day of December, 1873, see section 5595 of the revised statutes of the United States on page 1091, and the first paragraph of section 1 of the appendix or amending act on page 1433 of revised statutes, and also the title of the original act.

That it was the intention of congress to make both acts take effect at the same time, see section 2 of the amendment on page 1437, revised statutes.

On the twentieth of June, 1874, congress passed an act entitled. "An act providing for the publication of the revised statutes and laws of the United States" (18 Stat. at Large, 113), by which the secretary of state was directed to prepare certain "head-notes, marginal notes, references," etc., and when so prepared to certify the law, and when so certified and printed and promulgated, it should be legal evidence of such law. The secretary of state completed the work on the twenty-second day of February, 1875. See certificate of secretary of state on page next to title-page, revised statutes. This was ten days after the legislature of Arizona adjourned.

The election held in the county of Maricopa for the election of a probate judge on the first Monday in May, 1875, was void. No law authorizing an election to be held on that day is to be found in the printed statutes of the territory, nor is there such a law on file among the enrolled laws of the territory in the secretary's office. "The official printed volumes of the acts are the usual and authentic evidence to the court of the statute law." *Dwarris on Stat. L.* 135. In *Bolander v. Stevens*, 23 Wend. 132, the chancellor says he has very little doubt that the court is not authorized to look

beyond the printed statutes to ascertain whether the law was passed by a two-thirds vote.

In *People v. Purdy*, 2 Hill, 34, Justice Bronson says that, *for the purpose of giving effect to a constitutional provision*, he felt called upon to look beyond the printed statute book and examine the statute roll. There is no intimation that it would be admissible to carry the investigation further, and he regarded it as a matter of doubt whether it should be carried to this extent.

The case went to the court for the correction of errors, and the chancellor (Walworth) took the same view of the question as did Justice Bronson, but he gave no intimation that it was admissible to go beyond the statute roll, but says "it [the statute roll] is to be considered the only legal evidence that the bill has in fact passed." In considering the matter, there was no question relating to the journals of the legislature.

"A record or enrollment is a monument of so high a matter, and importeth in itself such absolute verity, that if it be pleaded there is no such record it shall not receive any trial by witness, jury, or otherwise, but only by itself." 2 Bla. Com. 330; *Sherman v. Story*, 30 Cal. 253.

"If the journal were every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act which, being a high record, must be tried only by itself." *Pacific Railroad v. Governor of Missouri*, 23 Mo. 353. "So it appears by the common law the statute roll was the absolute and conclusive proof of a statute. This record could not be contradicted. It implied absolute verity." Id. 364.

"Neither the journals of the legislature, nor the bill as originally introduced, nor the amendments attached to them, nor parol evidence, can be received in order to show that an act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, either did not become a law in accordance with prescribed forms, or did not become a law as enrolled. * * * If the fact of the passage of a law be denied, the question is to be tried and determined by the court as one of law, and can not be put in issue and tried as one of fact." *Sherman v. Story*, 30 Cal. 253.

"The plain answer is, that we can not look into the jour-

nals of the legislature to see when a bill was introduced, or how it passed through the two houses. If an act is properly enrolled, authenticated, and deposited with the secretary of state, it is conclusive evidence." *People v. Burt*, 43 Cal. 560.

If the enrollment, authentication, and depositing with the secretary of state are conclusive that a law has passed, the want of all these things is conclusive that there is no such law. If the journals of the legislature be referred to, it will be found that after passing the bill the second time it was by *special committee* (not in the ordinary manner) returned to the *governor*. The governor is not the custodian of the laws of the territory, nor is he required to care for their preservation more than any other citizen of the territory. His connection with the bill ceased when he returned it to the house in which it originated, with his objection.

There is no statute requiring of him any other duty as to the bill save to approve or disapprove. The secretary of the territory is required by law to "secure and safely keep in his office all original acts and joint resolutions of the legislature." Comp. Laws, sec. 2, c. 15, p. 185. To say that there is such a law as is claimed by the appellant, when the same is not found either in the printed statutes or on file among the enrolled laws, is putting on trial for official misconduct the secretary of the territory and the legislative council in a merely collateral proceeding, in which they are not parties and are wholly unheard, and "is a violation of their constitutional rights and the plainest dictates of justice." The legislature evidently did not intend that the act should become a law, for it can not be supposed that the legislative council were ignorant that the secretary was the custodian of the laws of the territory, and that in his office was the proper place to deposit the act to make it effective.

By Court, PORTER, J.:

This is an action in the nature of a *quo warranto*, in which the plaintiff seeks to obtain possession of the office of probate judge of Maricopa county. The complaint alleges that the plaintiff is probate judge of Maricopa county; that on the first Monday in May, 1875, an election was held for

the office of probate judge therein, for the term of two years from the first Monday in June, 1875, and that at such election the plaintiff was duly elected; that he received a certificate of such election from the proper officers and in due form; that he gave bond and qualified as required by law, and that he demanded of the defendant and was entitled to the possession of said office of probate judge, further alleging that the defendant had on the first Monday in June, 1875, usurped said office, and has ever since withheld the same from plaintiff; demanding judgment against the defendant that he be ousted from such office and plaintiff put in possession of the same.

The defendant, in his answer, denies that the plaintiff is probate judge of Maricopa county; denies that the plaintiff was elected to such office at any lawfully authorized election therefor—that the election pretended to have been held in said county on the first Monday of May, 1875, was not authorized to be held by any statute law of the territory of Arizona.

He further alleges, that the defendant was probate judge of Maricopa county; that he held said office by appointment of the governor of the territory of Arizona, under a commission from him dated the twenty-third day of February, 1875; that said commission by its terms appointed him such judge, to have and to hold the same until the thirty-first day of December, 1876; that he had executed the official bond, taken the oath as required by law, and was in the lawful possession of the office of probate judge.

On the trial of the cause no evidence was given by either party, but the case was submitted on stipulations between the parties as follows: That on or about the twenty-fifth day of January, 1875, a bill was introduced in the legislature of the territory of Arizona, then in lawful session, authorizing and directing that a general judicial election be held throughout the territory on the first Monday in May, 1875, and every two years thereafter, and that at such election a probate judge for each of the counties should be elected; that said bill passed both houses of said legislature, was duly enrolled and presented to the governor for his approval; that the governor returned said bill to the house where it originated—to wit, the council—on the twelfth day

of February, 1875, without his approval; that on the same day the council again passed the said bill by a vote of two thirds of the members thereof, the vote being taken by yeas and nays; that the said bill was then in the regular manner transmitted to the house of representatives for its action, and on the same day the said house passed the said bill by a vote of two thirds of its members, the vote having been taken by yeas and nays, and the said bill was then regularly returned to the council. The council returned the bill to the governor.

It is further stipulated that the election, or pretended election, mentioned in plaintiff's complaint was held as therein stated; that the plaintiff received the greater number of votes; that he received a certificate of election from the board of supervisors; that he executed an official bond, and demanded and was refused possession of the office, as alleged in the complaint; that defendant held said office by commission of the governor, in manner and form as set forth in defendant's answer.

The stipulations in this case do not appear to relate to any questions of fact between the parties that are personal and private in their nature, the determination of which might affect only the interest or conduct of the parties to this action; but they relate almost wholly to what transpired on certain days in a legislative body when having under consideration the question of the passage of a law to provide for the election of a probate judge in every county of the territory—a law general in its character, of interest to the living, and affecting the estates of the dead.

The issue raised by the pleadings clearly is, whether at the time stated in the complaint there was a law of the territory in force authorizing the election of a probate judge in Maricopa county. If there was such a law authorizing such an election in Maricopa county on the first Monday in May, 1875, the same law authorized a similar election in each county in the territory. If the law was then in force, it is still in force, and will by its terms authorize a similar election in May, 1877.

The court was asked to decide the issue, the determination of which reached far beyond the parties of record—to every county of the territory; to decide this not by taking judicial

knowledge of such a law, by examining the printed statutes, or the office of the properly appointed custodian of the original copies of laws passed—not even from the proved action of the legislature in considering such a law, but solely from the stipulations of the parties.

We hold that parties to an action can not properly stipulate what the law is that is to govern their case, and that courts should not regard such stipulations when made, and we are equally of the opinion that they can not stipulate what the action of a law-making body was in a given case, and from the stipulations thus made ask the court to determine whether a general law is or is not in force.

The agreement of parties that a statute with certain provisions is in force does not make it in force. The agreement of parties that a law-making body did certain things when considering a bill, even though the things they agree between them to have been done were all that were necessary in the opinion of a court to constitute its passage, does not constitute the bill a law. In deciding the issue raised, which we think would have been better raised by demurrer than by answer, we shall not regard the stipulation.

Was there, then, a law of the territory of Arizona authorizing the election of probate judge in Maricopa county, as alleged in the complaint? There is no such law among the published laws of the territory. There is no copy of such law in the office of the secretary of the territory, the officer who is the lawful custodian of the original bills that have been properly passed. Not finding any evidence of the existence of such a law in the published laws or in the office of the secretary, is it competent for the court to examine the journals of the two houses of the legislature, and seek there to find evidence of such law having been enacted and still in force?

The language of the authorities as marshaled in a leading case, *Sherman v. Story*, 30 Cal. 253, is stated that “the result of the authorities clearly is, that whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law. There is no plea by which its existence can be put in issue and tried as a question of fact.” In the same case it was held, “that the court, upon passing upon the validity

of a law that appeared among the published laws, would not examine the journal or the enrolled bill to see if it was published as passed."

If it is not competent in such a case to examine the journal or enrolled bill, to verify or alter the published law, it appears to us still more certain that the same rule should govern in a case like the present, where there is a total absence of any evidence of legislative action upon the law in question. If the enrollment, authentication, and depositing with the secretary of state is conclusive that a law has passed, the want of all these things may be conclusive that there is no such law. It appears to the court that it was never intended that the journals of a legislative body were to be regarded as evidence to the courts as to what laws were enacted by it, and that a court, in a merely collateral issue, would not be warranted in declaring a general law in force on such evidence alone.

The presumptions of law all are, that if the legislature had passed the law under consideration the same would have appeared among the published laws, or at least they would have seen that the secretary of the territory was provided with an enrolled copy thereof.

We are therefore of the opinion that on the first Monday in May, 1875, there was no law of the territory authorizing the election of a probate judge in Maricopa county, and that the election so held was without authority of law, and void. It follows from these conclusions that the judgment of the district court must be affirmed, but upon views in some respects different from those which seem to have prevailed in the court below.

Judgment affirmed.

TWEED, J., concurred.

DUNNE, C. J., delivered the following dissenting opinion:

I can not concur in the judgment of the majority of the court affirming the decree below, for the following reasons:

The plaintiff Graves, claiming to be the duly elected probate judge of Maricopa county by vote of the people, brought his action to oust from said office the defendant Alsap, claiming to hold the same office under appointment from the governor of the territory.

The case was tried by the court without a jury. The court found the following facts:

1. The jurisdictional facts as to the institution of the action, waiver of service, appearance of parties, facts of trial, etc.

2. This is literally copied. "That on or about the twenty-fifth day of January a bill was introduced in the legislature of the territory of Arizona, then in lawful session, authorizing and directing that a general judicial election be held throughout the territory on the first Monday in May, 1875, and every two years thereafter, and that at such election a probate judge for each of the counties should be elected; that said bill passed both houses of said legislature, was duly enrolled and presented to the governor for his approval, and that the governor returned the said bill to the council where it originated, on the twelfth day of February, 1875, without his approval, and on the same day the council again passed the said bill by a vote of two thirds of the members thereof, the vote having been taken by yeas and nays; that the said bill was then in the regular manner transmitted to the house of representatives for its action, and on the same day the house of representatives passed the said bill by a vote of two thirds of its members, the vote having been taken by yeas and nays, and the said bill was then regularly returned to the council, and that the council returned the bill to the governor."

3, 4, 5. In substance. The election was ordered in Maricopa county, and plaintiff elected thereat to the office of probate judge and qualified, etc., all in accordance with the requirements of said alleged law.

6, 7. In substance. That defendant was appointed to said office by the governor on February 23, 1875, under the old law, qualified, etc., and was in possession of the office.

As conclusions of law from the foregoing facts, the court found, in substance:

1. That the action of the legislature upon said bill, subsequent to the return of the same to it by the governor, was "without authority of law and was void."

2, 3. That the said election for probate judge in Maricopa county was without authority of law and was void, and plaintiff therefore not entitled to the office.

4, 5. That the defendant is entitled to the office and to judgment accordingly.

Judgment was entered in favor of defendant.

Plaintiff appears and assigns for error:

1. That the court erred in finding the conclusion of law that the action of the legislature upon said bill, after the return thereof without the approval of the governor, was "without authority of law and void."

2. That the court erred in finding the conclusions of law that the election was void.

3, 4, 5, 6. That the court erred in finding, as conclusion of law, that plaintiff was not entitled to recover and that defendant was.

It will thus be seen that if the regularity of the proceedings below be admitted, all the facts relating to this particular case are settled, as regularly found by the court sitting as a jury. They are established just as effectually as if they had been found by a jury of twelve men. They have been found by a jury, that is, by the court sitting as a jury. The findings of facts were reduced to writing and filed. There is no exception by either party as to the correctness of the finding of facts. All the facts which govern the case as between these parties are absolutely settled, and there can now be no question raised by either party as to which facts are or are not proven in this case so far as the act of finding was warranted by law. The error assigned is not that there has been any improper finding of facts, but that the court did not draw correct conclusions of law from those facts established on the trial.

The conclusion of law found below, upon which the court determined plaintiff's demand, was this, that the action of the legislature upon the bill, after it was returned by the governor without his approval, was without authority of law and was void.

The question here is, Was that proceeding regular? and if so, was it a correct conclusion of law upon the facts established on the trial?

The conclusion involves two propositions: 1. That the acts of the Arizona legislature in the premises were without authority of law; 2. That the acts were void.

The learned judge below did not find that the acts were

without authority and *therefore* void, but that they *were* without authority *and* that they were void.

Let us first examine whether the acts were or were not done without authority. All authority in the matter is regulated by the acts of congress. The legislature of Arizona had just so much legislative authority, and no more, as is given by the laws of the United States.

The following facts appear from the laws of the United States:

1. Up to December 1, 1873, under the laws of the United States, the governor of the territory of Arizona had absolute veto power.

2. On the twenty-second of June, 1874, congress adopted what are called the revised statutes of the United States, repealing all laws of the United States passed prior to December 1, 1873, any portion of which was embraced in any section of said revision, except laws of a private, local, or temporary nature.

3. The old law fixing powers of governors of territories as to the veto power was passed prior to December 1, 1873, and was embraced in said revision, and in said revision the provision giving absolute veto power to the governor of Arizona was omitted, and in lieu thereof it was provided that, notwithstanding his veto, a law might be passed by a two-thirds vote of each house of the legislature.

4. The law stood in that shape until the eighteenth of February, 1875, six days after the legislature of Arizona had passed the law over the governor's veto making probate judges elective.

5. On the eighteenth of February, 1875, congress amended the revised statutes by inserting a clause giving to the governor of Arizona absolute veto power.

Defendant, in support of the proposition that the legislature of Arizona had no authority to pass said bill over the governor's veto, argues:

1. As stated in his brief, in the following language: That "on the twentieth of June, 1874, congress passed an act entitled 'An act providing for the publication of the revised statutes and laws of the United States' (18 Stat. at Large, p. 113), by which the secretary of state was directed to prepare certain 'head-notes, marginal notes, references,'

etc., and when so prepared to certify the law, and when so certified and printed and promulgated, it should be legal evidence of such law. The secretary of state completed this work on the twenty-second day of February, 1875. See certificate of secretary of state on page next to title-page, revised statutes. This was ten days after the legislature of Arizona adjourned."

It is not clear for what purpose attention is called to this fact. The case was submitted on briefs, and there was therefore no opportunity of calling on defendant to explain the purport of this proposition. If it be intended to lead to the conclusion that the law itself was not in force until thus promulgated, the answer is, that the law became operative as soon as it was signed by the president. Certified copies of the act would have been evidence of the law at any time after its enactment. This was merely a provision to secure a great number of certified copies in a printed form, which, when duly certified, printed, and promulgated, should everywhere be received as evidence of the law. The same thing is done with the acts of state legislatures; provision is made that printed copies duly attested by the secretary of state shall be received as evidence of the law, but it is not supposed, nor is it the fact, that the laws are not in force until the printed copies are circulated. They are only a convenient means of proving the law.

2. Defendant, speaking of the amendments of February 18, 1875, claims that those amendments were to take effect at the same time as the revised statutes themselves, because of the wording of section 2 of the amendatory act, which reads as follows:

"Sec. 2. That the secretary of state is directed, if practicable, to cause this act to be printed and bound in the volume of the revised statutes of the United States."

I do not think there is much force in the argument that the expression by a legislature of a desire to have two or more laws printed and bound in the same volume, if practicable, is an indication of an intention on the part of the legislature to have all the laws thus bound together take effect at the same time, particularly when the laws were passed at different sessions of the legislature. The more reasonable method to discover when it was intended a law

should go into effect is to look at the provisions of the law itself on that point, and if nothing is said on the subject in the law itself, the presumption is that it takes effect on its passage.

In the British parliament at one time the rule was, that all laws took effect from the commencement of the session; in other legislatures there is a general rule that in the absence of other provisions all laws take effect from the last day of the session; but acts of our congress, in the absence of express provisions to the contrary, take effect from their passage. 1 Kent's Com. 455, note 1.

3. Defendant urges that the title of the original act is an indication that it was the intention of congress to have the amendatory act of February 18, 1875, take effect from the first of December, 1873, and refers us to that title.

On reference, I find that the title reads as follows: "An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873." How that title, of an act passed June 22, 1874, can give any indication of what congress intended in a subsequent act, passed the following year, is not clear.

4. Defendant urges that the intention of congress to have the act of February 18, 1875, take effect at the same time as the act adopting the revised statutes is shown by section 5595 of the revised statutes, and refers us to that section. To this argument there is the same objection as to the last. Section 5595, referred to, reads as follows: "Sec. 5595. The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873, as revised and consolidated by commissioners appointed under an act of congress, and the same shall be designated and cited as the revised statutes of the United States."

That section is a part of a law adopted June 22, 1874. How the words just cited can give any indication of what congress intended in a subsequent act, passed the following year, is not clear.

5. Defendant urges that the intention of congress to have the act of February 18, 1875, take effect one year, two months, and eighteen days prior to its adoption, is shown by

the wording of the first paragraph of section one of the act itself.

This paragraph, in my opinion, is a mere preamble, which undertakes to state the object of the act, and is in these words: "That for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, A. D. 1873,' so as to make the same truly express such laws, the following amendments are hereby made therein."

But a preamble is no part of an act; neither is the title. 1 Kent's Com. 461. Some modern authorities admit they may be parts of the act, but only formal parts, not governing the act itself. In our acts of congress, when the language of the title or preamble is entirely in accord with the spirit of the act itself, it is simply a corroborating circumstance as showing intent. The attention of legislators is especially directed to the provisions of the act itself, to the enacting clause proper. If those are satisfactory to the legislators, they know the phraseology of the title or the preamble is of little moment. The title and preamble are worded in accordance with the ideas of the original introducer of the bill. They are generally in harmony with the bill as originally drawn, but when the bill is submitted to the legislature it becomes the property of the house; it is often amended and transformed until its original author would not know it. Sometimes, when the fight is over, some member with a logical turn of mind rises and proposes an amendment to the title or preamble which will bring them into harmony with the new bill thus made. Sometimes the changes are so great and the amendments so incongruous, that no reasonable length of title could express the purport of the bill, and the original title is allowed to stand, and sometimes it stands through oversight, inattention, or indifference; and all this because legislators know that neither the preamble nor the title constitutes any portion of the act itself, and that the plain provisions of the act can not be affected by any inconsistency or incongruity between the act proper and things which are no part of the act itself. Thus we find that one of the most important acts ever passed by congress, the act changing the whole policy of this

government in the matter of the occupation and ownership of all the mines of gold, silver, cinnabar, or copper contained in the United States, is entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes;" and the most incongruous provisions of legislation are repeatedly found in acts the titles of which show they were introduced for the purpose of making appropriations. The essentials of an act are the propositions enacted; the rest are but attendant circumstances. "Propositions enacted" argues, of course, enacting clause and actual enactment. In cases where the courts find the language of the act so ambiguous that they have to resort to construction to try to discover the intent of the legislature, they may derive some light from a consideration of the title and preamble, as showing, possibly, to some extent, the intent of the legislature; but courts will not permit an act, plain in its own terms, to be made ambiguous because of some inconsistency between the act and its title or preamble. Only such ambiguities will be considered as are raised by the language of the act itself; for it is the act itself courts are required to enforce, not its title or preamble.

Let us now look at the legislation of congress on this subject of the revised statutes and see whether the acts themselves are intelligible or not. The initial legislation on this subject of the revised statutes is the act of June 27, 1866, entitled "An act to provide for the revision and consolidation of the statute laws of the United States."

Section one provides for the appointment of commissioners to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings."

Section 2, fixing the powers of these commissioners, says they shall bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundancies or obsolete enactments, and *making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections* of the original text.

Section 3 provides, "that when the commissioners have completed the *revision and consolidation* of the statutes as

aforesaid, they shall cause a copy of the same, in print, to be submitted to congress, that the statutes so *revised and consolidated* may be *re-enacted* if congress shall so determine."

Sections 4, 5, and 6 provide for the printing of the report in parts, for contemporaneous criticism, salary of commissioners, clerks, etc.

From this it will be seen that these persons were not compilers to merely report to congress what did exist as the law, but commissioners with power to revise, omit, supply, make alterations, amend imperfections, and report to congress such a body of law as they thought ought to exist, so that congress might, if it chose, *re-enact* such revision and declare it to be the law of the land, in lieu of all former laws on the subject embraced in such revision.

The commissioners, after a lapse of about seven years, submitted a revised and consolidated body of laws. Congress, by a regularly enacted law of March 3, 1873, raised a committee of three to accept on the part of the United States the draft of the revision of the laws thus prepared, but having in view the great powers conferred on the commissioners, and fearful that such acceptance might be construed into an adoption of the revision, they added a saving clause, that the effect of this act authorizing acceptance should not be construed as adopting the revision. Then, subsequently, on June 22, 1874, congress adopted the revision, possibly with amendments of their own added thereto, the same as they would enact any other law, and repealing all prior laws, any portion of which was embraced in said revision. The repealing words are very carefully chosen. They are as follows:

"Sec. 5596. All acts of congress passed prior to said first day of December, 1873, *any portion of which* is embraced in any section of said revision, *are hereby repealed*, and the section applicable thereto shall be in force *in lieu thereof* (all parts of such acts *not* contained in such revision having been repealed, *or* superseded by *subsequent* acts, not being general and permanent in their nature); *provided*, that the incorporation into said revision of any general and permanent provisions taken from any act *making appropriations*, or from an act containing other provisions of a *private, local, or temporary* character, shall not repeal or in any way

affect any *appropriation*, or any provision of a *private, local, or temporary* character, contained in any of said acts, but the same shall remain in force; and all acts of congress passed prior to said last-named day, *no part of which* are embraced in said revision, shall not be affected or changed by its enactment."

The repeal of the old laws was to date from December 1, 1873, but as the repeal was not made until June 22, 1874, it was seen that acts might have been done, rights might have accrued, and the tenure of office might have continued or have begun under the old laws after December 1, 1873, and before June 22, 1874, the day of the repeal. Then by section 5597, provisions were made for such cases by affirming the general principle of law that acts done and accrued rights could not be affected by such repeal, declaring that such repeal should not affect such acts or rights, nor the term or tenure of such offices.

It was also seen that various acts had been passed since December 1, 1873, and before the enactment of the revised statutes, and it was declared that all such acts should have effect the same as if passed after the enactment of the revised statutes, and then there was a declaration as to what that effect would be. This, so far as congress could do so, is a declaration of the effect of an enactment subsequent to the adoption of the revision. If A. is declared equal to B., and then the value of A. is declared, it is a declaration of the value of B. It was there declared that the effect of a subsequent statute would be to repeal any portion of the revision inconsistent with such subsequent enactment.

The question will arise as to the effect of such repeal upon acts done or rights accrued between the time of the adoption of the revised statutes and date of such repeal, and the answer to that question will, I think, be decisive of one question in this case.

Under the law prior to December 1, 1873, the governors of the territories of Utah and Arizona had absolute veto power. In the territories of Colorado, Dakota, Idaho, Montana, Washington, Wyoming, and New Mexico, the governors had only a qualified veto power.

What report the commissioners made on the subject I do not know, and it is entirely immaterial what they reported.

The act as passed by congress is before us, and is the law on the subject. In that act we find that congress placed the legislatures of all the territories on equal footing in this respect, giving to all of them the power to pass laws over the veto of the governor by a two-thirds vote, the act to date from December 1, 1873, saving and respecting, however, all acts done and all rights accrued between that date and June 22, 1874. The first question then is, Were the provisions of the old laws, giving absolute veto powers to the governors of Utah and Arizona, repealed and no longer in force after December 1, 1873?

The answer is, that they were repealed unless such provisions were of a private, local, or temporary character. They were not *temporary*, because there was no particular time when they should expire. They were not *private*, because they were a part of the general organic act of the territory, and related to the rights of the whole people of the territory. The courts of the territory would certainly take judicial notice of the organic act, which they could not do if they were private acts.

Were these provisions *local* in their character? Local is from *locus*, a place. It is defined by Webster: "1. Pertaining to a particular place, or to a fixed or limited portion of space, as local circumstances; 2. Limited or confined to a spot, place, or definite district, as a local custom."

Was this a provision relating only to a particular place? Was it something affecting a place merely, or something affecting the rights of the people of the United States in general. This was a most important provision, relating to one of the most important political rights a people can have—the right to make their own laws. It fixed their political *status* as a people. It removed restriction on their political power. It referred, not to the place, but to the people thereof, and to the people of the United States. If such a provision can be said to be local in the sense of the revised statutes, every provision concerning any territory is likewise local, for it is as local to give this right in one place as it is to withhold it in another, and on that theory no laws concerning territories have properly any place in the revised statutes, being all local in their nature. By the very act of revising the legislation concerning territories, and consolidating it all into

one uniform body of law, congress declared its understanding to be that legislation on this subject was legislation of a general and permanent nature. If the law fixing the political rights of the people of Utah and Arizona was a local law, in the sense of the revised statutes as to local laws not being repealed, then there was no propriety in making the amendment at all, for if it was a local law, then it was not repealed by the adoption of the revised statutes, but was in force without the amendment. True, this argument is not conclusive, for the amendment might have been made *ex industria*, but the fact that congress treated it as a general law by incorporating the general rule into the revised statutes, and then again treated the Utah and Arizona matter as a general law by inserting the provisions concerning them in the revised statutes, are corroborative facts tending to show that this view of the case is also the one taken by the congress of the United States. This point will be considered again later in this opinion. For the present, I will state that in my opinion all the old laws relating to territories were set aside excepting whatever provisions might have been therein contained of a private, local, or temporary nature, such as the provisions concerning fees of certain officers, the occupation of certain buildings, the prosecution of certain works, or such private, local, or temporary matters; that legislation concerning political power is not local, but that the general scheme of territorial government as to the exercise of political power in passing laws was uniformly fixed by a new general law, and all old laws on the subject were repealed.

The people of all the territories then stood upon an equal footing as to their political rights under the revised statutes until February 18, 1875. Up to that time the people of the territories of Utah and Arizona had power to pass laws over the veto of the governor, the same as people of other territories might do. The people of Arizona, it is claimed, exercised that power on the twelfth of February, 1875, passing, it is claimed, a certain law over the veto of the governor. Then, six days after the law had been so passed, congress amended section 1842 of the law concerning territories, by adding thereto the following provision: "Provided, that so much of this section as provides for making any bill passed

by the legislative assembly of a territory a law without the approval of the governor shall not apply to the territories of Utah and Arizona."

Now, what effect did the adoption of this amendment have upon the law passed by the legislature of Arizona February 12, 1875?

In the absence of any special words in the act of amendment, as to the time it was to take effect, it would of course take effect only upon and after its adoption. The only words which it is claimed govern on the matter are the following, constituting the first paragraph of the act: "That for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873,' so as to make the same truly express such laws, the following amendments are hereby made therein."

Now, what is a preamble? Webster, defines it as "an introductory portion; an introduction or preface, as to a book, document, or the like. Specifically, the introductory part of a statute, which states the reasons and intent of the law." This introductory part of the statute which states the reasons and intent of the law is, then, merely a preamble. It makes no difference that it is placed after the enacting clause instead of before it. Whether a certain collocation of words has force as a law or not depends, not upon their location on a page of the statute book, but whether they enact anything or not. Whether there is any law enacted in this paragraph or not is easily seen. Strike out what follows it, except the approval, and there is nothing enacted. There is nothing in it but a declaration of an intention to do something, namely, to correct errors and supply omissions in a certain act, so as to make the said act truly express what laws were in force December 1, 1873. It is claimed that these words make the amendments take effect at the same time with the act they amend. But suppose there was a concluding section saying they should take effect thirty days after the date of their passage; which would govern then, the preamble or the concluding section? The latter of course. But why? Is it because they would be the later expression in the act on the subject? No; for they would not be the *later* expres-

sion in the act; they would be the *only* expression in it on the subject, for the preamble is not a part of the act. There is no expression here in the act proper as to when the amendments are to take effect. They therefore take effect from the date of their adoption.

The preamble says the act is to correct errors and supply omissions, but, as I understand it, the first thing the act does is neither to correct an error nor to supply an omission, but to repeal sections and enact new ones, so as to change the law concerning how stationery shall be furnished to congress.

Is an act declaring how the clerk of the house shall buy his stationery to be considered a law general and permanent in its nature, and yet an act affecting the political rights of the whole people of the United States, to be considered a private, local, or temporary act? In the revised statutes, which it is declared contain the laws of a general and permanent character, we find acts regulating the management of the Smithsonian Institution, the salary of pages to the senate and house, compensation of one laborer in charge of private passage, the salary of the steward of the president's household, etc. Why are these considered general acts? Is it not because the people of the whole United States are interested in these salaries, since they have to foot the bill? And are not the whole people of the United States affected by this legislation concerning the veto power of the governor of a territory? Each separate territory is the property of the people of the United States. It is governed by officers appointed indirectly by the people of the United States; all the salaries of all those officers, as well as those of the members of the local legislature, and all the expenses attending the passage and printing of the laws, are paid by the people of the whole United States. The people of the United States are interested in all that concerns the government of these territories; but when it comes to the matter of making laws for these territories, as the law stood December 1, 1873, and as it now stands, the whole people of the United States are a part of the law-making power of the territory of Arizona—a part of the legislature. To pass a law in Arizona at present, three consents are necessary—the consent of the assembly, the consent of

the council, and the consent of the governor. There are thus three independent houses, so to speak, through which a bill must pass before it can become a law. The governor does not act for himself in this matter, of course. For whom does he act? Whom does he represent? Not the people of Arizona, for they did not make him governor: he represents the people of the United States, for it is they who indirectly have placed him there as a part of the legislature of that territory to act for them, the only owners and sovereigns of that territory.

The people of the United States said they would not trust the entire legislative power over the territory of Utah to the people there, because they felt there was a two-thirds majority there which would make laws of which they did not approve, and they reserved to themselves the right to an absolute veto, to be exercised by their governor. For some reason they declared the same thing with regard to Arizona. They will not even trust their governor in some of the territories, but reserve a further right of veto, even over his consent, to be exercised by their representative in congress.

Can it be said that a law that reserved to the people of the United States the right to absolutely veto the acts of the people of Arizona and Utah was a local law, affecting only the people of those territories? Did it not directly affect the people of the whole United States? If it was *not* a local law, then it was repealed the day the revised statutes were adopted, for it was not contained in those statutes, and all other laws were repealed except those of a private, local, or temporary character.

Congress has passed many acts concerning the rights of the people of the territories, and it has so carefully guarded the rights of the people of the United States to govern these territories themselves that in no two of the territories are the political rights of the people and right of *habeas corpus* the same.

In Idaho, legislative acts become laws unless vetoed in three days; if vetoed, they may be passed by a two-thirds vote; it is not necessary to submit them to congress for approval. Postmasters may hold territorial offices; the people control the government penitentiary; the delegate elected to congress must be a citizen of the United States;

the people can not assign the districts of the federal judges; they can not establish courts and fix their jurisdiction; they can not fix the day of electing their delegate to congress; and they are not entitled to *habeas corpus* on the same grounds as in the District of Columbia.

In no other territory are the rights of the people the same in all these respects. In two territories the veto may be delayed five days; in two the veto is absolute; in one no postmaster can hold a territorial office; in five the people can not control the territorial penitentiary; in six the delegate to congress need not be a citizen of the United States; in seven the people may assign the judicial districts; in seven the people may fix the day for electing delegates; in seven the people may have *habeas corpus* for the same reasons as in the District of Columbia; in only one can the people establish courts and fix their jurisdiction.

All of these laws are in the revised statutes of the general laws of the United States. Can any one of these provisions be said to be an exception to a rule? If so, which is the rule, and which is the exception? They can not be local acts, because they affect the rights of the whole people of the United States; they are not considered local by congress, because the commissioners, the men chosen as learned in the law, present them as general laws; congress, which may be supposed to know the difference between a general and a local law, enacts them in the revised code of general laws.

In what, then, does their generality consist? Not in the application of the rule; for there is no general application of any rule, except the rule that the governing power of all territories is in the whole people of the United States; that not even a law creating the office of constable may stand if the people of the United States at large do not choose to have it so. The generality of this consists in this: that all these acts are legislation on the general subject of the political rights of the people in the territories, and that every act on the subject affects the whole people of the United States, as either taking some power from them and giving it to the people of the territory, or recalling some such power already granted.

There is another fact which goes to show that congress

did not consider that a provision affecting only a particular territory was therefore a local provision.

Title 23 of the revised statutes is devoted to legislation concerning the territories, but it is divided into three chapters: Chapter 1, consisting of fifty-six sections, is headed, "Provisions Common to All the Territories;" chapter 2, containing fifty-seven sections, is headed, "Of Provisions Concerning Particularly Organized Territories;" chapter 3, composed of twenty-two sections, is headed, "Provisions Relating to the Unorganized Territory of Alaska." Now, there is nothing in the chapter relating to Alaska which applies to any other territory of the United States. No provision is made allowing the people of that territory to make laws in any manner for their own government, but it is declared they shall be governed by the general laws of the United States; that is, governed by the people of the whole United States, to whom the territory belongs.

No courts are established in Alaska for the administration of those laws; but the Alaskans are given over to the jurisdiction of the United States district courts of California, Oregon, and Washington. The principal industry of the territory, the seal-fisheries, is placed under the control of the treasury department of the United States. The secretary of the treasury is authorized to appoint an agent to manage the seal-fisheries, and to perform such other duties as the secretary may assign to him. This agent is the local representative in Alaska of the power and authority of the United States.

This act concerning the unorganized territory of Alaska is local, in the sense that it relates on one side to Alaska, but on the other side it relates to the owners and sovereigns of Alaska—to the whole people of the United States—as indicating how their power shall be felt in Alaska. It is a declaration of the sovereign power as to how Alaska shall be governed, and affects, not only the people who live in Alaska, but the people who bought, paid for, own, govern, and control Alaska, and it is therefore a general law, and is in its proper place in the code of general laws. If it was a mere local statute, it had no business in the general code. If it was a mere local act, it remained in force without a re-enactment. But congress did not look upon it as a local act,

and the people of the United States do not consider that the government of Alaska is a mere local matter with which they have nothing to do.

In the same way congress enacted in chapter 1, fifty-six provisions common to all territories. There remained, then, in the old laws a great number of particular provisions, some relating to only one territory, some to two or more territories. If those provisions were regarded as mere local exceptions to a general law, and therefore as mere local laws, they would have kept their place in the statute book without re-enactment; but congress did not look upon it in that light. On the contrary, it went carefully through all the laws relating to territories, collected all those acts called by counsel "local exceptions" but called by congress "provisions concerning particular territories," and re-enacted such of these particular provisions as they still desired to continue in force, enacting them in a separate chapter of title 23. In that chapter they filled fifty-seven sections with such particular provisions, even to the point of regulating where the United States marshal should have control of a federal prison and where he should not. If we can not judge by this what were the particular provisions they intended should be continued, how can we judge? There is a maxim, *Expressio unius, exclusio est alterius*.

But here is an expression as to an intention to retain fifty-seven particular provisions, the fifty-eighth left out, and yet it is claimed that we are bound to consider that they intended to retain the fifty-eighth also.

I take it, then, that in leaving out the particular provisions, existing in two separate acts, which gave absolute veto powers to the governors of two territories, congress intended they should be left out, and that the old laws on this subject were repealed by the adoption of the revised statutes. We can not consider them as in force after the adoption of the revised statutes, without construing directly against the letter of the statute. And so far as the spirit of the act is concerned, the action of congress in the matter, having had its attention called to particular provisions, having legislated on particular provisions, having declared what ones it intended to retain, shows, if it shows anything, that congress acted in the matter with full notice of these provisions, and deliber-

ately omitted them. To construe against the very letter of the law, is to go to the extreme limit of judicial power in the matter, and will never be done if any reasonable construction can be given to the law as it now stands.

Is there anything unreasonable in thinking that congress meant to do what it did do? There were nine territories, and in seven of them the people were granted full legislative powers. In two of them this power was restricted by a particular limitation; the act, as it stands, removed the particular limitation and placed all upon an equal footing.

Are we to leave the plain, direct, unequivocal language of the statute, and go about the law, behind the law, and presume an intention different from what is expressed, and construe on that presumed intention, set aside the letter of the law, destroy uniformity and set up diversity, where the effect of the statute as it stands is to remove diversity and establish uniformity?

It is claimed that the legislation concerning the government of the District of Columbia is not in the revised statutes, and that that is an argument to show that congress looked upon that legislation as local. This is a mistake. The legislation concerning the District of Columbia is found in the revised statutes. It is true it is not found in the first volume thereof, but congress specially ordered that "the revision of the statute relating to the District of Columbia, to post-roads, and the public treaties" be published in a separate volume, and entitled and labeled "Revised statutes relating to the District of Columbia, and post-roads, and public treaties," which has been done.

An act granting certain powers may be a general act. The power thus granted may be exercised only in a particular place. The power may be exercised only in a certain locality, but the act granting the power may still remain a general act. States pass general laws concerning notaries public, providing for a certain number in each county, but limiting the exercise of notarial power to the county in which the notary resides. An exception is made as to one county, providing that the notaries of that county may exercise notarial power in an adjoining county, also thus giving the notaries of one county more power than is given to others. Then comes a revision of the statutes, in which, by general law,

notarial power is abolished. There is a section in the revision saying that all general laws not in the revision are repealed. Would the notaries of the favored county still have notarial powers, on the plea that they had them by virtue of a local law?

A law is not necessarily local because it seems to operate only in a particular locality. The territory of Arizona was acquired by treaty; that is, the territorial area now called Arizona was so acquired. A treaty is a law of the land; was that law by which Arizona was acquired a local law, affecting Arizona alone? It seemed to relate only to Arizona; it seemed to simply change the political condition of the people of Arizona, effecting a change in their citizenship, but that was by no means the extent of the operation of the law. That law, which seemed limited in its effect to Arizona, really affected every member of the body politic of Mexico and of the United States. It affected a change in political and proprietary rights. Would a law transferring Cuba to the United States be a local law? It seems to relate only to the statutes of Cuba. Would a law ceding Arizona back to Mexico be a local law? It seems to apply only to Arizona. Why is it not a local law? Because in ceding Arizona to a foreign power the people of the United States would divest themselves of proprietary and political rights.

The people of the United States by treaty acquired the political right to make laws for the government of Arizona. Any law by which the people of the United States become divested of those rights, in whole or in part, is a general law, because it concerns the people of the whole United States. When the people of the United States cede political power to the people of Arizona, they are divesting themselves of it for the time being as completely as though they ceded those rights to Mexico. It may be called a *lease* of power, as distinguished from an absolute divestment, because in one case it can be resumed at will, in the other not; but even then, does not a lease of rights affect both parties to the act, the lessor as well as the lessee?

When the people of the United States ceded to the people of Arizona a limited power of making their own laws, the law by which it was done was a general law, because it affected the political power of the whole people of the United

States. The act, then, which gave the people of Arizona power to make such laws as might receive the sanction of the governor was a general and not a local law, because, though it affected the people of Arizona very materially in giving them a certain amount of political power, it affected the people of the United States to the very same extent, for the gain of the people of Arizona was the exact measure of the loss of the people of the United States.

I am therefore again led to the conclusion that the act fixing the political power of the people of Arizona prior to December 1, 1873, was a general law, and was repealed by the adoption of the revised statutes June 22, 1874, which established a different rule on the subject, increasing the political power of the people of Arizona by giving them power to pass laws notwithstanding the objections of the governor.

It is, however, contended they did not have power to do so on February 12, 1875, by reason of the amendatory act of February 18, 1875.

Having considered the old law as repealed, we may then look on the revised statutes of June 22, 1874, as the original law on this subject, and the question will then be as to the effect of the amendment of February 18, 1875. I have already shown that I do not consider there is anything in the amendatory act—that is to say, in the act proper—declaring when the amendments are to take effect, and that they therefore take effect only from their enactment, to wit, February 18, 1875; and that any laws passed prior to that date, and since December 1, 1873, over the governor's veto, stand as laws of Arizona until repealed. I have shown that I consider that the clause which it is claimed gives these amendments a retroactive effect is merely a preamble. But suppose it is not a preamble, but in fact a part of the act: even then it could not affect the validity of the law of the legislature of Arizona duly passed February 12, 1875, in accordance with the provisions of the revised statutes of 1874, over the governor's veto, for two reasons: 1. Because congress had no power to give the act that effect; 2. The acts *in pari materia* show it was not the intention of congress, in the adoption of the revised statutes, to invalidate any

act done or disturb any right which accrued under existing laws.

1. Congress has no power to give a statute such a retrospective effect as will destroy vested rights. The doctrine is stated by Kent in the following language: "A retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." 1 Kent's Com. 455.

The vested right in the case which can not be destroyed is not the right of the plaintiff to the office of probate judge, but is the right to a certain amount of political power which vested in the people of Arizona the day the limitation on their legislative power was removed by the adoption of the revised statutes, June 22, 1874. From that day until February 18, 1875, they had vested in them the right to make laws by a two-thirds vote of the legislature, notwithstanding the objection of the governor. It was shown that there was at least an attempt to exercise that right. An attempt was made to at least thus pass a law. Under that alleged law, if properly passed, the people acquired the right to elect a certain class of judges. Everything that could be done to give the people that right, if the law was really passed, was fully and completely done. True, they had not yet exercised the right of election, but the right of election was not the right which vested under the act of congress. The right which vested under the act of congress was the right to make laws, notwithstanding the objections of the governor, and that right they had exercised, or at least attempted to exercise. Subsequent acts of congress might recall this right of legislation, but they could not recall the acts done while that right existed. A principal may revoke the authority of an agent, but he can not annul acts duly performed and consummated while the authority existed.

Whether congress thought it had the power to do so or not is immaterial. Its power in the matter was exhausted when it passed the law. The powers of the government are divided into three co-ordinate branches, each supreme in its sphere. It is the province of the judiciary to declare the effect of laws. This right is not shared by the legislative

department, but is an exclusive attribute of the judicial power.

The language of what I consider the preamble in the amendatory act of February 18, 1875, undertakes to say that the effect of these amendments shall be to make the revised statutes adopted June 22, 1874, truly express what was the law December 1, 1873, not congress. For congress to undertake to do it is to usurp judicial functions. It would be no more irregular for the president to do this by proclamation than for congress to do it by declaration. In Kent's Commentaries the rule is stated: "It seems to be settled as the sense of the courts of justice in this country, that the legislature can not pass any declaratory laws, or acts declaratory of what the law was before its passage so as to give it any binding weight with the courts." 1 Kent's Com. 456, note *b*, and numerous cases there cited in support of the proposition as to the authority of co-ordinate branches of government. Here is an attempt, on February 18, 1875, by congress to declare what law was in force December 1, 1873. But the courts can not accept the declaration of a legislature that a certain law was in force on a certain prior day. To admit a contrary doctrine would be to take the construction of statutes from courts and give it to the legislature.

The courts must take the statute books, and from them discover and declare what laws were or were not in force on a certain day. Congress claims that the non-insertion in the revised statutes of the provision giving absolute veto power to the governor of Arizona was an omission—that congress intended to insert it. So they might have intended to enact a whole law, but from any cause might have omitted to do it—can we adjudicate upon such an intention?

The doctrine of intention in construction is, that where a law has really been enacted, but its meaning is by its own terms ambiguous, that is, capable of two constructions—"ambiguous, and with double sense deluding"—then if the intention of the legislature can be clearly ascertained, the sense which will give effect to that intention will be adopted.

But to supply a whole proviso of new and independent matter, constituting an exception to the law as it plainly reads, simply because the legislature may declare that they

intended to enact that proviso, but that by some mischance it was overlooked and omitted, is further than courts can be expected to go.

2. When an intention as to the policy of an act is shown by an actual declaration in an act, in the form of an enactment therein, and that policy is in accordance with public policy and sound law, that will be accepted as the declared policy of the act, and as showing the spirit and intention of subsequent acts *in pari materia*, if there be nothing in subsequent acts to make such a construction an unreasonable one.

In the first act adopting the revised statutes, it was declared, in section 5597, that the adoption of these statutes, repealing former acts, should not affect any act done or any rights accrued before the repeal of the former acts. This was because the repeal took place June 22, 1874, to date from December 1, 1873, and this was to save all acts done and all rights accrued while the old acts were in force; in other words, although the repeal was to date back to December 1, 1873, nothing which was regularly done in the mean time should be disturbed, nor any accrued rights be destroyed. In the subsequent act *in pari materia*, it is claimed that it was intended to have the change in the law relate back to a certain date, but the spirit of the organic act saves all acts done and all rights accrued in the mean time. There is nothing in the subsequent act declaring any intention to depart from the declared policy in the organic act in this respect.

The language of the statute is much stronger than the general rule of law on the subject. The general rule is, that rights to be saved must be clearly vested, but the policy of this act is declared in broader terms. It goes so far as to say that every act done and every right accrued under existing laws stands as good, notwithstanding changes in the law. I am therefore of the opinion that on the twelfth of February, 1875, the legislature of Arizona territory had authority and power to pass an act notwithstanding the objections of the governor.

It may then be thought that the only question remaining is, Did they really do it? But that is not the question in this case. The question in this case is, Was it, *in this case*,

under the pleadings, *necessary* to prove, and if so, was it proved, that they really did it? This brings me to the consideration of the second proposition contained in the first conclusion of law of the judge below, in which he said that the acts were void.

2. Were the acts of the legislature void?

On this point the defendant urges in his brief a proposition in the following language:

"6. The election held, etc., was void. No law authorizing an election to be held on that day is to be found in the printed statutes of the territory, nor is there such a law on file among the enrolled laws of the territory in the secretary's office. * * * If the journals of the legislature be referred to, it will be found that after passing the bill the second time, it was by special committee (not in the ordinary manner) returned to the *governor*. The governor is not the custodian of the laws of the territory, nor is he required to care for their preservation more than any other citizen of the territory. His connection with the bill ceased when he returned it to the house in which it originated, with his objections. There is no statute requiring of him any other duty as to the bill save to approve or disapprove. * * * To say there is such a law, as claimed by the appellant, when the same is not found either in the printed statutes or on file among the enrolled laws, is putting on trial for official misconduct the secretary of the territory and the legislative council, in a merely collateral proceeding, in which they are not parties and are wholly unheard, and is a violation of their constitutional rights and the plainest dictates of justice."

To this argument there are two answers: 1. The secretary of the territory is not put on trial for any official misconduct, because there is nothing to show the bill was ever delivered to him; it has not been traced to his hands, and he can not keep what was never intrusted to him. 2. The defendant is bound by the facts established in this court, by the facts found by the court sitting as a jury, filed in the case as the facts found proven, and the finding not excepted to.

It is urged that the stipulation as to proof made by plaintiff can not help him in this action; that the court below could not take notice of facts brought in only by the stipulation; and yet it is only from the stipulation that the right

of the defendant to the office by appointment appears. Yet the court took notice of the facts there shown in his favor, and on them adjudged that he was rightfully entitled to the office. Why must it not take equal notice of the facts stipulated in plaintiff's favor? It was a stipulation as to mere probative facts, entirely capable of actual proof in case they really existed. If defendant thought plaintiff could not prove them, he was not obliged to admit them. He simply waived the formal proof, admitting that the facts were as claimed. He denied the conclusions which plaintiff wished to draw from them. It is not alleged, nor does it appear, that this is a feigned issue.

Let us see first what acts congress required or directed the legislature to do if it wished to pass an act over the veto of the governor, and then what acts it is proven in this case were done, so as to see whether the legislature fully complied with all the requirements or not.

Section 1842 of the revised statutes says (and I number the provisions for convenience in reference):

1. "Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor.

2. "If he approve it, he shall sign it;

3. "But if not, he shall return it, with his objections, to that house in which it originated,

4. "And that house shall enter the objections at large in its journal

5. "And proceed to reconsider it.

6. "If after such reconsideration two thirds of that house agree to pass the bill,

7. "It shall be sent, together with the objections, to the other house,

8. "By which it shall be likewise reconsidered,

9. "And if approved by two thirds of that house, it shall become a law;

10. "But in all such cases the vote of both houses shall be determined by yeas and nays,

11. "And the names of the persons voting for or against the bill shall be entered in the journal of each house."

Now in the matter of this bill, acted on by the legislature of the territory of Arizona, February 12, 1875, all of these

things may have been done, but in this case the record does not affirmatively show that it was proven in the trial below that all of these things were done.

1. The record does not show that the fourth requirement was complied with, viz., that the house to which the bill was returned entered the objections at large on its journal; but neither does it show that the governor stated any objections. The court found the fact on this point to be that the governor returned the bill "without his approval." I do not see that we can go beyond that finding in this respect, and presume that the governor did state objections. So far as the record goes, it does not appear that he stated any objections. I do not then see how it could be held that the omission to prove that objections of the governor were entered in the journal would affect this case, for we do not know that there were any objections to enter.

2. The seventh direction speaks of sending the objections of the governor with the bill, when the latter is sent to the house. The record here does not explicitly state that any objections of the governor were sent with the bill, but the court below found that after the bill had been passed by a two-thirds vote in the council "the said bill was, in the regular manner, transmitted to the house of representatives for its action." So far as the transmission was concerned, it seems to me that the finding of the court, if good for any purpose in this matter, shows it was sufficiently regular, particularly as it does not appear that there were any objections to transmit.

3. The eleventh direction says the yeas and nays shall be entered on the journal of each house. The record in this case does not show whether that was done or not. Was it necessary in this case for plaintiff to prove that that was done? How does the matter of proof stand? Under the pleadings in this case, what proof was necessary for the existence of this law? Plaintiff, in his complaint, alleges that he was the duly elected and qualified probate judge of Maricopa county. He alleges the election was duly held, stating the time of his election, the fact thereof, when he received his certificate, when he qualified, and when he made demand for his office. He did not plead the law under which he claimed. The defendant did not demur. He answered, and

pleaded *nul tiel record*, alleging there was no law of the territory authorizing such an election. It seems to be pretty well settled that an issue as to the existence of a public law can not be raised in that way. See numerous cases cited in *Sherman v. Story*, 30 Cal. 253. From that case I quote as follows: "Thus in *The Prince's Case*, 8 Co. 28, 'it was resolved that against a general act of parliament, or such act whereof the judges *ex officio* ought to take notice, the other party can not plead *nul tiel record*, for of such acts the judges ought to take notice. But if it be misrecited, the party ought to demur in law upon it, and in that case the law is grounded upon great reason; for, God forbid, if the record of such acts should be lost or consumed by fire or other means, that it should tend to the general prejudice of the commonwealth, but rather, although it be lost or consumed, the judges, either by the printed copy or by the record in which it was pleaded, or by other means, may inform themselves of it.'" See also Dwarris on Stat. 613.

Defendant says, in this case, in his brief, that the law is lost; that is, that it can not be found in the secretary's office; that the journals show it was delivered to the governor, but that he is not responsible for it. Yet the case in 8 Coke says that in such cases, God forbid that it should tend to the general prejudice of the commonwealth; that in such cases the judges, either by a printed copy or by the records, or *by other means*, may inform themselves of it. Dwarris says "the existence of a public act must be tried by the judges, who are to inform themselves in the *best way they can*." The existence of a law is not a question to be left to a jury to determine on the accidental evidence before them. Senator Verplanck's opinion (as judge), cited in *Sherman v. Story*, 30 Cal. 264.

In *De Bow v. The People*, 1 Denio, 14, Mr. Chief Justice Bronson says the question must be settled by the court as a question of law. *Sherman v. Story*, 30 Cal. 268. The Supreme court of California says, in the last-cited case, that "at common law not even the plea of *nul tiel record* was admissible. There was no plea by which the existence of a general act of parliament, as a question of fact, could be put in issue and tried. It was regarded as a question of law alone, of which the judges were bound to take notice. If

the enrollment was in existence they would consult it, but of course would not go beyond that record. *But if that had been lost or destroyed*, and there was no printed statute (which I will remark is what defendant claims here), it was necessary for the judges to look for it in other documents where it had been recited or recognized and acted upon, *or to inform themselves in the best mode they could.* It was still a question of law and not of fact, and they were supposed to know the law." *Sherman v. Story*, 30 Cal. 259.

The legislature of Arizona have adopted the common law as the rule of decision in all courts of this territory, in all cases not in conflict with the statute law governing them. Comp. Laws, 524, sec. 7. I do not know of any statute here changing the common-law rule of pleading in this respect. I am confident there is none, and that the question of the existence of the law under which plaintiff claims was never properly raised in this case. The court found, as facts proven, that all the proceedings as to the election itself were regular—that the election was held, that plaintiff was elected, received his certificate of election, filed his bond, and took the oath required, and made demand of the office.

No question as to the existence or validity of the law under which he was elected having been properly raised, how should it have been determined? I think defendant misconceives the effect of the authorities he quotes from 30 California.

Statutes without some necessary penalty, either expressed or implied, are merely directory. They may be followed or not, as parties choose, for if there is no penalty, how does it matter? In the act of congress governing this case, there is no declaration of the consequences of non-compliance; to be fatal, it should have so declared, unless it can be found from the law and practice in such cases that non-compliance with all these forms is held to be fatal. I am of opinion it will be found that inquiry as to the fact of compliance or non-compliance with these requirements is not allowed, even when the attempt is directly made to invalidate the statute because of the very fact of non-compliance.

The effect of *Spangler v. Jacoby*, 14 Ill. 298, is not that the party claiming the existence of a statute must show affirmatively that the yeas and nays were entered in the

journal, but that is a matter of defense that the party denying the validity of the act may prove the journals, and if he can show from them that the vote was not entered, he may thereby defeat the act. Even in this decision, the supreme court of California remark that it was decided by two justices, the third being absent, and that the ruling was expressly based upon the very special provision of the constitution of that state. *Sherman v. Story*, 30 Cal. 270. Even in *Spangler v. Jacoby*, the court declared that if the journal is lost or destroyed, it will be intended that the proper entry was made on the journal. *Sherman v. Story*, Id. 271.

When the journal is not produced, when the defendant does not attempt to show a non-compliance, then must it not also be presumed by the court that either the journal is lost and that the entry will be intended, or that defendant, failing to produce it, and failing to undertake to show non-entry, waives any objection on that point?

In *Pacific R. R. v. Governor of Missouri*, 23 Mo. 353, it was declared that inquiry could not be made as to whether the legislature had complied with a direction requiring particular forms to be observed in passing a bill. This was where the rules for the action of the legislature were prescribed by the constitution—certainly as binding a requirement as the provisions of the act of congress in this case.

The court says, to go into an inquiry as to whether all the forms had been complied with, "would seem like an inquisition into the conduct of the members of the general assembly; and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law. This inquiry may be extended to good as well as bad laws; to those passed as well with the approval of the governor, as those which are passed, his objections to the contrary notwithstanding; for it is clear that if a law passed over the objections of the governor may be impeached by inquiry whether the forms of the constitution were observed in its enactment, the same inquiry may be instituted in relation to laws passed with his sanction; and thus statutes, constitutional on their face, regular in their terms, which may have been the rule of action for years, and under which large amounts of property have been vested and numerous titles

taken, may be abrogated and declared void." (I will remark here that every law of Arizona territory rests on this footing. See section 8, page 179, compiled laws, which requires the vote on the final passage of all bills to be by ayes and nays, and entered in the journal. Under the doctrine contended for here by defendant, the validity of every law of this territory would depend upon whether the clerk of either house had or had not possibly, in a moment of hurry, carelessness, or neglect, omitted to make a certain entry in his minutes.) The court continues: "A principle with such a consequence should be supported by a weight of authority which no court can resist. When we reflect on the manner in which journals are made up, and the rank of the officers to whom that duty is intrusted, how startling must the proposition be that all our statute laws depend, for their validity, on the journals of the two houses of the general assembly showing that all the forms required by the constitution, to be observed in their enactment, have been complied with! The required form may be observed, and the clerk may fail to make the necessary or correct entry. If the journals had been designed as the evidence in the last resort that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been intrusted to a single clerk, with a power in the house to dispense with their reading, even should there be a rule requiring them to be read?—a matter, however, about which the constitution is silent." *Sherman v. Story*, 30 Cal. 272.

In *Turley v. County of Logan*, 17 Ill. 152, the correctness of the above decision, on general principles, was expressly admitted, but it was again claimed that the constitution of Illinois required a different rule in that state. But on this point Mr. Justice Skinner, who was not on the bench when *Spangler v. Jacoby*, 14 Ill. 298, was decided, expressly reserved himself, even under the constitution of Illinois. *Sherman v. Story*, 30 Cal. 274.

In *Sherman v. Story*, the supreme court of California say it is a remarkable commentary on the worthlessness of journals as evidence of the law, that out of the dozen cases cited

in that opinion, in at least two of them, if not more, it was shown that the clerks blundered in making up the journals, and adds this language: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose paper of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischief absolutely intolerable." *Sherman v. Story*, 30 Cal. 275.

What is the effect upon this case of all this law? I take it that it has this effect, that it establishes the proposition that the defendant himself, even if he were regularly at work impeaching the law, having admitted all the substantial facts concerning its passage—the original passage, the veto, the reconsideration, the two-thirds vote in each house, and the taking of the vote by ayes and nays—could not himself have introduced proof to show whether the journals contained the record of the vote or not. This, under the rule in *Sherman v. Story*, 30 Cal. 275, and what the court there says, is the general law. Even under the restricted rule in the case of *Spangler v. Jacoby*, 14 Ill. 298, on which, it is plain, much doubt is thrown by the courts of other states, as also by the new judge on the bench when that case was decided, all the defendant can claim is, that if he were regularly impeaching the validity of the act he might bring in the journals, and if the record of entry were not there, he might claim that its omission invalidated the act.

But he is not regularly impeaching the validity of the act, and if he were, it is not shown that the vote is not recorded; so he makes no point in any event. But the point that is made is by no means clear, that defendant could in any case offer proof that the record of the vote does not exist. If there had been a clear issue as to whether the act had passed, and the act itself had been produced on the trial, what proof of its passage would have been sufficient? Simply this: the certificate of the presiding officer of each house that the bill was passed by a two-thirds vote. It would not have been necessary that this certificate should state anything about record or transmission of objections, vote by ayes and nays, or record of the vote. See the attes-

tation of the passage of the civil rights bill in congress over the veto of the president, April 9, 1866. The certificate in that case proves one fact only, the substantial fact that the bill passed by a two-thirds vote. That is all the plaintiff could have been asked to establish in this case. He proved it by the admissions of the defendant. What clearer proof could he give?

As to their disposition of the bill in sending it to the governor. He is the person to whom, under the absolute veto power, they were obliged to send all bills. He received them. If he approved of them, he signed them and handed them over to the secretary for safe keeping. When the legislature found themselves suddenly in possession of a new power of legislation, they found, after the passage of the bill, that there was no legislation as to where it should be sent. This because they never had any use for such a regulation, never before having had the power to pass bills in that way. They had been in the habit of sending all their bills to the governor. It is well known that our laws are mainly copied from the laws of California. In that state the rule, after the passage of a bill over the governor's veto, is to send the bill again to the governor, who is to deposit it with the secretary of state. Defendant says the journals show that the legislature appointed a special committee to carry the bill to the governor and deposit it with him. Yet defendant says in his brief that because the legislature sent the bill to the governor in this way, they evidently did not intend that the act should become a law.

For what purpose, then, did they appoint a special committee to carry this act to the head of the executive department of the territory?

The clause in section 1842 of the revised statutes, as to passing laws over the veto of the governor, is copied from the provision in the constitution of the United States relating to passing laws over the veto of the president. I do not find any provision in the acts of congress prescribing what shall be done with a bill after it is passed over the veto of the president; but I apprehend that if the legislative department of government, in transmitting its laws to the executive department, should send a special committee to the head of the executive department, instead of to a secretary

of his department, it would not be considered as irregular, nor as invalidating the act.

There is no mode prescribed in Arizona territory for authenticating statutes passed notwithstanding the objections of the governor. Neither do I find any in the laws of the United States concerning a bill passed over the veto of the president. I find the United States statutes at large are printed without any certificate from anybody in the printed copy of laws stating that they are correct copies of the law. There is an act of August 8, 1846, declaring that a certain edition of the laws printed by Little & Brown is declared complete evidence of the laws, without any further proof or authentication thereof.

On April 9, 1866, congress passed an act on civil rights. It was vetoed by the president. It was passed over his veto. Under section 7. of article 1 of the constitution, it was required that the vote in such cases should be taken by ayes and nays, and the names of the persons voting for and against the bill should be entered on the journal of each house respectively. In the attestation of the passage of the bill over the veto, it is not stated that the constitutional provisions were complied with as to entering the veto on the journals, nor was it stated that the vote was taken by ayes and nays. The same section of the constitution requires that the objection of the president should be entered at large in the journal, yet it is not stated that this was done. Yet the proof of the mere fact of its having received the two-thirds vote is declared by congress to be sufficient to establish the law. Therefore, the plaintiff in this case could not have been required to prove compliance with the requirements as to entry of objections, nor that the vote was by ayes and nays, nor that entry thereof was made in the journal, even if the validity of the law had been regularly put in issue; much less is he required to establish it when there has been no issue raised on the subject.

The pleadings in this case did not raise the issue. It is true such does not seem to have been the understanding of the pleaders, but the question as to what issues are raised by the pleadings is to be determined by the established rules of pleading, and not by the understanding or intent of the pleader.

The court has no power to submit this question to be tried by a jury as an ordinary question of fact. Section 153 of our compiled laws says issues are of two kinds, of law and of fact. Section 154 says an issue of law arises by demurrer; it can not then be raised by an answer. Section 156: An issue of law shall be tried by the court, unless it be referred upon consent, as provided in this chapter. The matter as to reference is settled in the section on pages 413 and 414, compiled laws. The trial of an issue of law may be referred. The parties must *agree* to the reference, and their agreement be filed, or entered in the minutes. The reference shall not consist of more than three persons. The existence or non-existence of the statute in this case was a question of law. It was tried by the court sitting as a jury. Properly it could be tried *only by the court or by a reference* agreed upon by the parties. Therefore, the whole matter of trying it by a jury in the ordinary way was irregular, even if the issue had been raised on the pleadings. *A multo fortiori* was it error when there was no such question raised?

It is seen here how easily this issue could have been fully tried. If the existence of the statute were denied, and the issue properly raised as one of law, it could have been tried by the court or by a reference of three persons. The court or the referees would, as Dwarrissays, have informed themselves on the matter in the best way they could, and have determined the matter accordingly. But even if this mode would have been adopted, the conclusion of law from the admitted facts of the case was error.

The substantial facts, viz., the intention of the bill, original passage, veto, and subsequent passage by a two-thirds vote, were all proved, and that was sufficient to prove the existence of the statute.

To say that because the act itself can not be found in the secretary's office it can not therefore be proved in any way, is to say that the will of the people, solemnly enacted in the form of law, may be entirely defeated by any one who chooses to abstract the roll of the statute from the secretary's office; but I call attention again to the language quoted in *Sherman v. Story*, 30 Cal. 275: God forbid that the will of the people should be thwarted in that way. If such a case arises, the authorities are that the judges will inform

themselves of the existence of the statute and its contents, as Dwarris says, in the best way they can.

The cases cited in 30 California, and relied upon by defendant, are where parties undertook to contradict the actual official record of the law, but in this case there was no attempt to contradict a record; it was claimed the act was lost, and the effort was simply to prove what the record contained. The issue was not raised on the pleadings, but the plaintiff voluntarily furnished proofs of all the essentials of the statute, the substantial facts of its passage and what it contained. Clearly, under all the rules, he was entitled to do this, even when fairly put on proofs. He furnished the strongest, most indubitable proof, the admission of the defendant himself, reduced to writing and filed in the case. He therefore proved the existence of the statute.

A statute is the will of the people, just as a certain document may be the will of a deceased person. But neither the paper nor the writing thereon, in either case, constitutes the *will* spoken of. The words are but the symbols used to convey the will of others, to show what the will is. The contents of a lost will may be proven. So may the contents of a lost statute. The fact of loss, it may be said, must be first established. Not necessarily. That is a ground of objection to the evidence, but if the objection is not made, and the evidence is admitted, it stands. No objection was made in this case; on the contrary, the fact of loss was set up by the defendant himself, and he there admitted the contents of the instrument and its execution; that is, in this case, certain facts as to its execution, which facts in law are sufficient to establish its execution.

The decision in this case does not extend beyond the parties. It does not bind the people in any other case. If another case arises, the question can be raised again. The decision of the supreme court is the law only of the case in which it is rendered. If the defendant here has admitted more than can be proven in another case, or than could have been proven in this case, it is his own affair. Each case stands on its own merits.

It is true, parties can not stipulate that, as a matter of fact, a certain law exists. Neither can they deny that it exists as

a fact, because the existence or non-existence of a statute is not a question of fact, but a question of law.

The parties in this case did not stipulate as to what the law was; that is the very thing the defendant would not admit—that this law did exist. He was willing to admit certain things were done; whether because he was satisfied they could easily be proven, or because he knew himself what they were in fact, does not matter.

He admitted the facts, but he denied utterly that therefore there was a law. But these facts which he admitted show that the law does exist.

I am therefore of opinion:

1. That on the whole of the twelfth of February, 1875, and up to the eighteenth day of that month, the legislature of the territory of Arizona had power to pass laws notwithstanding the objections of the governor.

2. That the existence of the law authorizing the election held in this case was not called in question in this case, nor its effect and purpose, as claimed by plaintiff.

3. That nevertheless, though not required to do so, plaintiff showed facts sufficient to establish the existence of the statute and its contents, sufficient to govern this case.

4. That he showed a right to the office under the law.

5. That therefore the decision of the court below, denying his right to the office, should be reversed.

UNITED STATES v. BARNARD ET AL.

FILING OF ANSWER WILL NOT BE PERMITTED AFTER DEFAULT, unless the defendant satisfies the court, in some way, that there is reasonable ground to presume that he has a valid defense to the action.

APPEAL from the district court of the third judicial district, Yavapai county. The opinion states the case.

J. A. Rush, J. P. Hargrave, and J. W. Leonard, for the appellants.

The question in this case arises upon the construction to be placed upon that part of section 957 of the revised statutes of the United States which reads as follows: "When

suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his accounts, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officer of the treasury and rejected, specifying in the affidavit each particular claim so rejected, and that he can not then safely come to trial."

While there have been in the several courts of the United States many cases under this section, still there have been none reported in which there is any construction of it as to its effect upon sureties upon the bond of an alleged defaulting officer. The nearest approach to an authority upon the question at bar is the case of the *United States v. Lyon*, 2 McLean, 249, in which it was held that the section did not apply to a case in which the principal debtor was not a party to the action.

So also in another case it was held not to extend to suits brought by the United States as indorsees of promissory notes. *United States v. Blacklock*, 2 Cranch C. C. 166. Thus it appears that whenever this section has been construed with reference to the parties affected by the provision, it has been held to apply only to the principal debtor. And this construction will, we think, fairly arise upon the section itself, construed according to its language and evident intention. The words "revenue officer," "or other person," "the adjustment of his accounts," "unless the defendant makes an oath"—the singular number being preserved throughout—all taken together, seem to leave no other fair inference than that the "revenue officer or other person accountable for public money," and he alone, falls under the ban of its harsh provision. Upon no other theory could the case of *United States v. Lyon* have been decided.

The sureties can not be held to cognizance of the question whether or not the proper proceedings had been had in the department at Washington, and are only liable for the failure

of the postmaster, Barnard, to pay over moneys due to the United States. If, as a matter of fact, the defendant Barnard did turn over to the agent of the post-office department the sum of one thousand eight hundred dollars in postage stamps, etc., for which he received no credit, then they should be entitled to plead it. Under a fair construction of the section referred to, the appellants should have been allowed to file their new answer.

E. B. Pomroy, for the respondent.

The statute is explicit as to what shall constitute a defense in cases of this nature, and as to what the court shall do. R. S., sec. 957. And under the familiar rule, *Expressio unius est exclusio alterius*, every defense but the one required by statute must be excluded. Broom's Leg. Max. 421, and authorities there cited. Therefore the answer which defendants sought to introduce, not being such a defense as the statute contemplates, was properly excluded by the court below.

By Court, DUNNE, C. J. :

The complaint alleges, in substance:

1. That defendant Barnard was postmaster at Prescott in said Yavapai county at the time hereinafter stated.

2. That February 23, 1870, defendants executed a bond to the United States in the penal sum of eighteen thousand dollars, conditioned to be void if defendant Barnard faithfully discharged all his duties as postmaster aforesaid according to law and the regulations of the post-office department, specifying in detail many of such regulations, among them the following: "And moreover, should faithfully account with the United States *in the manner directed by the said postmaster general* for all moneys, postage stamps, stamped envelopes, bills, bonds, blanks, etc., received by him as such postmaster for the use of said office."

3. That said Barnard, between April 1, 1870, and July 31, 1871, received, as postmaster, public moneys amounting to one thousand nine hundred and seventy-nine dollars and sixty-nine cents, and fraudulently converted the same to his own use.

4. That on an accounting with the United States, July 31, 1871, defendant Barnard was found to be indebted to the United States in the sum of one thousand nine hundred and seventy-seven dollars and sixty-nine cents, and on February 24, 1872, was directed to pay the same to one A. J. Sullivan, postmaster of Sante Fé, New Mexico, but refused to do so, and no part thereof has been paid.

Prays judgment. Filed October 24, 1872.

Service of summons made on all the defendants. Return of summons filed March 25, 1873.

Defendant Wormser demurred, in substance:

1. That the court had no jurisdiction of the person of the defendant nor the subject of this action, because: *a.* The complaint is not signed by plaintiff nor its attorney; *b.* Summons has not issued upon any complaint filed in this court or any other court known to the laws of the United States or of this territory; *c.* Summons has not issued from a court having authority, nor has it been signed by an authorized clerk, nor returned by an authorized officer.

2. That the complaint does not state facts sufficient to constitute a cause of action. Filed March 13, 1873.

Defendant Barnard, the postmaster, answered, admitting office, bond, and indebtedness as charged; denies conversion of funds; alleges they were embezzled by his clerk; denies refusal to pay said Sullivan said sum or any sum; alleges action barred, because not commenced within two years from liability. Filed July 24, 1873.

Defendant Wormser, who had demurred as aforesaid, then answered, admitting office of Barnard, denying execution of the bond; on information and belief, denying indebtedness; as to alleged defalcation, alleging that he has no knowledge thereof sufficient to form a belief; also pleading two years' limitation. Filed February 24, 1873.

On the eleventh day of October, 1875, long after time for answering had expired, defendants Stevens, Wormser, Moeller, Bean, and Henderson asked leave to file an answer, in substance as follows:

1. Admitting that Barnard was postmaster, as charged, February 29, 1870, but denying that he was postmaster any longer than to and until on or about April 1, 1871.

2. Admitting the bond.

3. Alleging that on or about April 1, 1871, J. N. Dawly, United States special post-office agent, took possession of Barnard's office, with one thousand eight hundred dollars' worth of stamped envelopes, etc., charged to Barnard, taking and using the same for the United States, plaintiff herein.

4. Denying breach of bond by Barnard, alleging that if he had been credited with said one thousand eight hundred dollars, as he should have been, his account would have been balanced, etc.

Defendants offered to show by affidavits that the facts set up in said proposed answer had come to their knowledge since the time for answering had expired, and that it was offered in good faith. The United States district attorney waived affidavits and consented that the motion be heard as though such affidavits were filed. Motion denied. Defendants excepted.

Then, October 14, 1875, the cause coming up regularly for trial, judgment, that defendants failing to make oath that they were equitably entitled to credits submitted to accounting officers of the treasury and rejected, plaintiff have judgment with costs. Defendants appealed from the judgment.

There is nothing to show that the demurrer of defendant Wormser was ever disposed of. It is true he answered; but under section 42 of our practice act a party may demur and answer at the same time. It may have been error to have rendered the judgment against him, but there is no assignment of error here on that ground. We could not consider there was error in this respect without presuming, though the record be silent on the point, that the court did not in fact dispose of the demurrer. We can not presume this. Also, there is nothing in the record to show that issue was joined in the case by any of the defendants other than by Barnard and Wormser, further than the recital in the judgment "and the said defendants being present by counsel," but there is no assignment of error that the default of the other defendants had not been entered, or that the entry of the judgment as against them was irregular in any other respect than the one assigned as error.

The notice in the summons is sufficiently full to warrant a judgment by default to the extent of the judgment actually

rendered. And in the absence of anything to the contrary in the record, it will be presumed that the proceedings below were regular in all that is necessary to support the judgment.

The assignment of error in this case is as follows, as stated in folio 2 of transcript: "Such appeal is taken on the following assignment of error, to wit: that the court erred in refusing to grant leave to the defendants to file the answer referred to in the bill of exceptions."

The application of defendants below, the refusal of which is assigned for error, was an application to file an answer after the time for answering had expired. The first rule governing the court in this matter is found in the sixty-eighth section of our practice act, as follows: "The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this chapter."

The question then is, Was there good cause shown why this leave should have been granted?

The question as to what would have been good cause in this case is determined by some very special provisions in the revised statutes of the United States. Section 957 of those statutes reads as follows: "When suit is brought by the United States against any revenue officer or any other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account, *it shall be the duty of the court* to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officer of the treasury and rejected, specifying in the affidavit each particular claim so rejected, and that he can not then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other

sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court verifying such plea on motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper specified in the affidavit. And no continuance shall be granted except as herein provided."

"Sec. 958. In suits arising under the postal laws, the court shall proceed to trial and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the post-office department which has been submitted to and disallowed by the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant continuance until next term."

"Sec. 952. No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the post-office department, unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident."

If the above sections should be thought to relate more particularly to the officer himself, note the following:

"Sec. 951. In suits brought by the United States against individuals, no claim for a credit shall be admitted on trial, except such as appear to have been presented to the accounting officers of the treasury for their examination, and to have been by them disallowed in whole or in part, unless it is proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by unavoidable accident."

These sections of course have no relation to what a defendant may state in his answer, if he chooses to answer. He may state what he likes in his answer, subject to the usual motions to strike out as in other cases. They relate to granting continuance, and to what claims may be admitted on the trial of the cause.

But when a defendant is in default and asks leave to make an answer after time, one of the main things always demanded by courts is, that he satisfy the court in some way that there is reasonable ground to presume that he has a valid defense to the action. Unless he raise some such presumption, there is no reason for opening the case and delaying it. If he undertakes to show what it is he claims he can prove on the trial, and the law is clear that such a defense would avail him nothing in the trial, and there is not other cause shown for opening the case, a refusal of the judge below to permit the answer after time will not be reversed as error. It would be plain, in such a case, that the party had not shown good cause for opening the case.

Now, could the defendants have shown on the trial the facts which they say they desired to show, we are satisfied from the rule in *Giles' Case*, in the United States supreme court, 9 Cranch, 212, as found in 3 Curtis, 339, that defendants could not have used this defense on the trial. In that case the action was against Giles and his bondsmen. The defendants claimed a credit which had not been submitted to the officers of the treasury and rejected. Such a claim is not considered a good defense in the case of the principal.

The question was, Could the sureties avail themselves of it? Did they stand in any different position in the matter from the principal? At this point the court says: "If, then, in a suit against Giles himself, a claim for the credits, under the existing circumstances, could not be sustained, neither can it in an action on this bond without permitting the defendants to do indirectly what the marshal could not have done directly, and in this way avail themselves of what the law seems to regard as a default, or at least a negligence, on the part of their principal." 3 Curt. 339.

And so the defendants in that case were held liable, although it was actually proven on the trial, and so found by special verdict of the jury, that the marshal had really paid

the money to the United States district attorney, and it was customary to so pay it. But because he had not presented his vouchers from the district attorney to the accounting officers, and had his accounts for such payment allowed or rejected, the mere fact of paying could not avail his bondsmen on the trial.

And so in this case, even if the case had been opened, the answer permitted, and the parties had actually proven on the trial all they claim they could prove, it would have availed them nothing, the credit could not be allowed, and the court would still have been obliged to enter judgment against them.

The defendants, to have been able to advance a claim for credits on the facts alleged, must have shown on the trial that the claim had been presented and rejected before the commencement of the suit, or that they had vouchers at the time of the trial not before in their power to procure, and that they had been prevented from presenting them by absence from the United States, or unavoidable accident.

True, the time of trial had not yet arrived, and it may be that they could, on the trial, have made the showing. If they thought they could have done so, they should have made a showing that they expected to be able, when the cause would be called for trial, to show vouchers and bring themselves within the statute. They did not do this. They did not make any showing to the court which made it reasonable to presume that on the trial they would have a valid defense. They did not, therefore, show any good reason why the court should exercise its discretion and allow an answer to be filed after time. There was therefore no error in the action of the court denying the motion.

Wherefore, the judgment is affirmed.

ANNA C. WOFFENDEN, PLAINTIFF, v. RICHARD WOFFENDEN, DEFENDANT.

JUDGMENT IS FINAL WHEN RENDERED AFTER HEARING the complaint, answer, and argument of counsel for plaintiff and defendant, and the term at which it was rendered has elapsed.

COURT HAS NO POWER TO KEEP JUDGMENT UNDER ITS CONTROL, after it has decided the case on its merits, upon a proper hearing.

WORDS "AND UNTIL THE FURTHER ORDER OF THIS COURT," added to a decree of the court making an injunction perpetual, do not make such decree interlocutory, nor do they give the party against whom the decree has been rendered the right to move for the dissolution of the injunction at a subsequent term of the court.

APPEAL from the district court of the first judicial district, Pima county. Bill for an injunction. The facts are stated in the opinion.

Titus & Hughes, for the appellant.

Farley & Pomroy, for the respondent.

By Court, PORTER, J.:

This case arose upon a complaint in the nature of a bill of equity by the plaintiff, a married woman, to enjoin the defendant, her husband, from interfering with her separate property, or with the "rents, issues, and profits thereof."

The complaint is as follows:

"Complaint. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant.

"Anna C. Woffenden, the above-named plaintiff, complains of Richard Woffenden, the above-named defendant, and alleges:

"1. That defendant and plaintiff are husband and wife, that they intermarried at Tucson, in the county of Pima, territory of Arizona, on or about the — day of —, A. D. 1872, and ever since have been, and are now, husband and wife.

"2. Plaintiff further alleges that she is of the age of twenty-one years and over.

"3. That on the thirteenth day of August, 1873, for the purpose of preventing difficulties and misunderstandings arising between them, articles of agreement were entered into, made, and signed by said defendant and this plaintiff,

a copy of which articles of agreement, marked 'Exhibit A,' is hereunto annexed, and prayed to be made a part of this complaint. That by said articles of agreement said defendant covenanted, promised, and agreed to and with the said plaintiff that he, the said defendant, would not in any manner seek to control or derive any benefit from the separate property of plaintiff, nor from the rents, issues, and profits of said property.

"4. Plaintiff further alleges that on the seventh day of October, 1873, the said defendant, in violation of his aforesaid covenant, promises, and agreements, and in violation of the legal rights of said plaintiff over her separate property, served notices upon the tenants of said plaintiff to pay the rents due and owing on the separate property of plaintiff to said defendant.

"Wherefore, the plaintiff demands judgment: 1. That the said defendant be enjoined from exercising any control or authority over the separate property of said plaintiff, or the rents, issues, and profits thereof; 2. For the costs of this suit."

The contract referred to is as follows: "This indenture made and entered into this thirteenth day of August in the year of our Lord one thousand eight hundred and seventy-three, between Richard Woffenden and Anna Charauleau Woffenden, his wife, both of the village of Tucson, in the county of Pima, and territory of Arizona, in consideration of the mutual promise and agreement of the said parties made to each other before marriage, and to prevent difficulties and misunderstandings arising between them in the future, witnesseth:

"That in consideration of the premises, and of the covenants, promises, and agreements hereinafter contained of the said Anna C. Woffenden, the said Richard Woffenden does hereby covenant, promise, and agree to and with his said wife, Anna C. Woffenden, that while the said parties shall live together as man and wife, the said Richard Woffenden will, from his own separate property and means, pay and defray all the household expenses of every class and description necessary to the comfortable maintenance of himself and his wife, the said Anna C. Woffenden; those

hereinafter expressly provided for by the said Anna C. Woffenden.

"And the said Richard Woffenden further covenants, promises, and agrees to and with the said Anna C. Woffenden, his wife, that he will not in any manner seek to control or to derive any benefit from the separate property of his wife, the said Anna C. Woffenden, nor from the rents, issues, and profits of the said property, and that he will pay and defray all his private and individual expenses, including his own clothing, etc., from his own separate property and means.

"And in consideration of the premises, and the covenants, promises, and agreements hereinbefore contained of the said Richard Woffenden, the said Anna C. Woffenden, wife of the said Richard Woffenden, does hereby covenant, promise, and agree to and with the said Richard Woffenden, that she, the said Anna C. Woffenden, will, from her own separate property and means, pay and defray all expenses incurred by her in keeping and maintaining one or more horses, with the carriage or other vehicle used with the same, and will also pay and defray from her own separate property and means all her own individual and private expenses, including her own clothing, etc., and that she will not in any manner seek to control or to derive any benefit from the separate property of her husband, the said Richard Woffenden, nor from the rents, issues, and profits of the said property.

"In witness whereof, the parties to these presents have hereunto, and to another of like tenor and date, set their hands and seals the day and year first above written.

"RICHARD WOFFENDEN. [Seal.]

"ANNA C. WOFFENDEN. [Seal.]

"Signed, sealed, and delivered in presence of —."

Upon which the judge at chambers directed this order:

"This complaint will be heard on Monday, the seventeenth instant, at ten A. M. of that day, on not less than four days' notice to the defendant, and in the mean time the property and interest of the plaintiff not to be in any manner or degree prejudiced or interfered with by the defendant.

"November 10, 1873. JOHN TITUS, Judge, etc.

"Filed November 10, 1873. O. Buckalew, Clerk. By S. W. Carpenter, Deputy."

And upon hearing, the following order for injunction was entered:

"Order for injunction. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant.

"To Richard Woffenden:

"1. The above-named plaintiff having commenced an action in the district court of the first judicial district of the territory of Arizona, in and for the county of Pima, against the above-named defendant, and having prayed for an injunction against said defendant requiring him to refrain from certain acts in said complaint and hereinafter more particularly mentioned.

"2. It is therefore ordered by me, the judge of the said district court of the first judicial district, that until further order in the premises, you, the said Richard Woffenden, and all your counselors, solicitors, and agents, and all others acting in aid and assistance of you and each and every one of you, do absolutely desist and refrain from exercising or attempting to exercise any control or authority whatever over the property, both real and personal, or any part thereof, in the possession of and owned by the said Anna C. Woffenden at the time of her marriage, together with all such property, both real and personal, which the said Anna C. Woffenden has acquired since her said marriage, or the rents, issues, and profits thereof.

"November 18, 1873. JOHN TITUS, Judge, etc.

"Indorsed: Filed November 18, 1873. O. Buckalew, Clerk. By S. W. Carpenter, Deputy."

An answer was filed in the case, November 28, 1873, as follows:

"Answer. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant.

"The defendant answers to the complaint:

"1. And for a first defense denies: 1. That he did agree with the plaintiff as alleged, or at all; 2. That he has in any way interfered or attempted to control the separate property of said plaintiff.

"2. And for a further and separate answer and defense, alleges: 1. That the articles of agreement between plaintiff and defendant, referred to in the complaint, were signed by the defendant without the defendant's knowledge of the con-

tents thereof, and with the full and explicit understanding with plaintiff's counsel that the same was void, and did not affect or abridge any of the material rights of the said defendant. 2. That the plaintiff has not performed the conditions of said articles of agreement, but on the contrary has wholly omitted in defraying the expense of keeping and maintaining one or more horses, with the carriage or vehicle, as set forth in said articles of agreement, and has acted towards him, the said defendant, in such a manner as to foment strife, and encourage difficulties and misunderstandings between plaintiff and defendant as man and wife.

"Wherefore, the defendant demands that the action be dismissed at the cost of plaintiff, that the injunction granted by this court be discontinued, and that plaintiff be perpetually enjoined from further prosecution of this said action.

"Filed December 1, 1873. O. Buckalew, Clerk. By S. W. Carpenter, Deputy."

At the regular December term, 1873, the cause having come on regularly for hearing, the court gave the following judgment in the case:

"Copy of judgment. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant.

"This cause having come on regularly for hearing on the tenth day of December, A. D. 1873, and being argued by the parties' respective counsel, O. F. McCarty, Esq., for the plaintiff, and L. C. Hughes, Esq., for the defendant, was by the court taken under advisement and consideration. Now, on this fifteenth day of December, A. D. 1873, the decree of the court therefore is that this cause having come to a final hearing on bill, answer, and argument of counsel, therefore, and in consideration thereof, it is now hereby ordered and decreed that the injunction heretofore issued and still existing in the case ought to be and the same is made perpetual, or until the further order of this court.

"Done in open court this fifteenth day of December, A. D. 1873.

"Indorsed: Filed December 15, 1873. O. Buckalew, Clerk. By S. W. Carpenter, Deputy."

It does not appear that any other proceedings were had in the case until nearly two years afterwards, during which

time three regular terms at least of the court had intervened; but on August 4, 1875, the defendant gave notice of motion, in the same court that entered the foregoing judgment, that he would move that the injunction in this action be dissolved, and the court, on a hearing on the original pleadings and argument of counsel, made the following order:

“Order dissolving injunction. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant.

“At a regular term of the district court of the first judicial district of the territory of Arizona, in and for Pima county, held at the court-house August 16, A. D. 1875.

“And now comes as well the said plaintiff by her attorneys, Messrs. Titus & Hughes, as the said defendant by his attorneys, H. Farley and H. B. Summers, and thereupon this action comes on for a hearing before the court, on motion of defendant's attorneys to dissolve the injunction heretofore granted in said cause.

“On reading the complaint of plaintiff and the answer of defendant herein, and on motion of H. Farley, Esq., counsel for defendant, and after hearing Messrs. Titus & Hughes, Esqs., counsel for plaintiff, in opposition, it is ordered that the injunction granted on the eighteenth day of November, A. D. 1873, against the above-named Richard Woffenden, be vacated and dissolved.

E. F. DUNNE,

“Judge First District Court, A. T.

“Indorsed: Filed August 16, 1875. Jos. B. Austin, Clerk.”

We are of the opinion that the court below erred in entertaining the motion to dissolve the injunction in this case, and in dissolving the same, as by the record of all the proceedings it appears conclusive that the same case had already been fully and finally heard and decided.

We can not come to other conclusions, for it is apparent that all the facts of the case were the same before the court on both hearings. The language of the notice of motion to dissolve is that the documents to be used on said motion were the complaint, answer, and order for injunction and records of the court, and no other cause or reason is assigned for asking the court to set aside a judgment entered by it nearly two years previous.

It is urged by defendant that the last clause of the judgment, "or until the further order of this court," is conclusive that the judgment was not intended as a final judgment of the court, and was subject to reversal at any time. While the language is peculiar, it does not have to us such significance.

The judgment recites that the cause "came on regularly to be heard." The case had already gone through the stages ordinary in this class of cases—an order restraining defendant, then a temporary injunction, then at regular term of court issue joined, complaint and answer verified by both parties, arguments of counsel.

The judgment recites that having come to a final hearing on bill, answer, and argument of counsel, it is now hereby ordered and decreed that the injunction heretofore issued and still existing in this case ought to be and the same is made perpetual.

The whole subject-matter of the motion was then *res judicata*.

If this was clearly the judgment of the court, if issue had been joined and the case had been before the court on its merits—and the record clearly shows that it was as fully so in the hearing when the injunction was made perpetual as when the order from which this appeal was taken was entered—then we hold the rule to be, and that governs this case, that "a court can not open a decree, after there has been a regular trial and judgment upon the merits, after the term at which the decree was entered had expired. Its jurisdiction over the decree at the end of the term is exhausted, except, perhaps, in cases where it is shown that a mistake, accident, or surprise or negligence of counsel occurred by which a decision on the merits was prevented." None of these grounds were alleged, nor do they appear to have existed. Freeman on Judgments, sec. 100, and authorities there cited; 1 Abb. (U. S.) 302.

As to just what the court meant by the closing words of the order cited and relied upon by counsel we are not clear, except that they do not detract from the proposition that the judgment was a final judgment of the court. If the court meant to say that the injunction was final until the court changed it by direction of an appellate court, it effected

nothing. If the court meant to keep the judgment under its control after deciding it after a hearing on its merits, it plainly exceeded its power, and the closing clause should not be regarded on appeal.

In Freeman on Judgments, the learned author, commenting upon the authorities upon this subject, says: "The interests of society demand that there should be a termination to each controversy."

Courts have no power, after fully deliberating upon causes and ascertaining and settling the rights of parties, to add clauses in their judgment authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. The law does not permit any judicial tribunal to exercise a revisory power over its own adjudications after they have in contemplation of law passed out of the breast of the judge. *Bank of the United States v. Moss*, 6 How. 31.

"If a vacillating, irresolute judge were allowed to thus keep causes ever within his power to determine and re-determine term after term, * * * litigation might become more intolerable than the wrongs it intends to redress." Freeman on Judgments, 68.

The rule laid down in *Hill v. City of St. Louis*, 20 Mo. 584, and we hold it a safe one, is, "Leave granted in one term to set aside the judgment at the next term is void," and this appears to be the construction in effect claimed by the respondent, that the injunction was decreed to be, after a final hearing, perpetual, but that the closing clause, "or until the further order of this court," is to be construed as a license to the losing party to ask the court at some future day, under more favorable circumstances, again to pass upon the question.

It will not be denied that the judgment making the injunction perpetual in this case is certainly a final judgment in the ordinary form if the concluding clause is omitted, and that it was founded upon proceedings ordinarily had in such cases. If, then, it was proper for the court to have added it in this case, and if it is proper for this court to give to it the effect claimed by respondent, then it would follow that a district court could, if so disposed, keep any and all judgments within its control by adding the words

here found at the end of its judgment. If the clause in this case renders the judgment interlocutory, and not subject to appeal, but only to be set aside or modified by the court that entered it, the same formula attached to the judgment from which the appeal is taken, or to any other judgment, would necessarily affect it in a similar manner.

The rule was announced in the case of *Baldwin v. Kramer*, 2 Cal. 582, "that after the expiration of a term of the district court no power remains in it to set aside a judgment or grant a new trial." And the learned judge adds: "A different doctrine would lead to great uncertainty, and possibly to gross abuse; there must be a time when the rights of the parties are to be considered determined, and for litigation to cease." And for this purpose the law has wisely fixed the rule here indicated.

Applying the rules before stated to this case, we are of opinion, as already indicated, that they effectually dispose of the same. It therefore does not appear necessary to examine the record of errors, either of law or of fact, committed on the trial of the cause.

The order vacating and dissolving the injunction must be set aside.

TWEED, J., concurred.

FRANCIS TORQUE, PLAINTIFF, v. LEOPOLD CARRILLO, DEFENDANT.

IT IS NOT ERROR FOR COURT TO INSTRUCT JURY upon their returning into court and asking for further instructions, although defendant's counsel is not at the time present, provided the defendant himself is present.

VERDICT OF JURY MAY BE RECEIVED IN ABSENCE OF COUNSEL for the defendant.

AFFIDAVIT OF JUROR IS NOT ADMISSIBLE TO IMPEACH VERDICT of the jury, where the minutes of the court show that the verdict was in writing, signed by the foreman, that it was recorded by the clerk in the presence of the jury, that it was then read to them by the clerk, who asked them if that was their verdict, and they answered that it was.

APPEAL from the district court of the first judicial district, Pima county. The facts appear from the opinion.

Farley and Pomroy, for the appellant.

Believing that the points set forth in the transcript, with one exception, are sufficiently clear upon their face without adducing authorities upon them, we proceed at once to take up and discuss the proposition No. 2 therein, viz.: Insufficiency of the evidence to justify the verdict, which is one of the grounds assigned by our statute upon which a new trial may be granted. Comp. Laws, 415.

1. There was no evidence introduced showing fraud, malice, or oppression on the part of the defendant; therefore the measure of compensation was matter of law, and the plaintiff was not entitled to vindictive or exemplary damages. Sedgwick on Measure of Damages, 515.

2. There was no evidence introduced as to the damages resulting to the plaintiff from the injuries he had sustained, and the jury could not proceed to give compensatory damages for loss of any kind to the plaintiff, if they were unaware of the amount of that loss. Where there is no malice or negligence shown on the part of the defendant, the rule is: The proper measure of damages is the amount of loss the party has sustained by the injury; it may be for loss of time, for medical attendance, or any of the necessary expenditures directly resulting from the injury received. Sedgwick on Measure of Damages, 25.

3. But the evidence showed that the plaintiff committed the first assault, and that in the scuffle which resulted from the efforts of the defendant to defend himself plaintiff received the injuries complained of. That the injury was an accident, of which accident the plaintiff was the first cause, and the general rule is, that it is a justification to the defendant that the prosecutor or plaintiff gives the first blow; but the resistance ought to be in proportion to the injury received. *Elliott v. Brown*, 2 Wend. 500; *Scribner v. Beach*, 4 Denio, 448; Sedgwick on Measure of Damages, 101, 534, 540, 637; Whart., sec. 1258; Hilliard on Torts, 181.

Briggs, Goodrich, and McCaffry & Clark, for the respondent.

All intendments must be in favor of sustaining the judgment of courts of original jurisdiction, and to disturb such judgments, it is not sufficient that error may have intervened,

but it must be affirmatively shown by the record. *Nelson v. Lemmon*, 10 Cal. 49.

The presumption of law is that the evidence warranted the verdict. *Doll v. Anderson*, 27 Cal. 248.

A motion for a new trial is addressed to the sound legal discretion of the court. *Hull v. Bark Emily Banning*, 33 Cal. 522.

When the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, and that some of those given are subject to verbal criticism. *Brooks v. Crosby*, 22 Cal. 42.

Every intendment must be in favor of a decision of the court below. *De Johnson v. Sepulbeda*, 5 Cal. 149.

The verdict of a jury can not be impeached by the affidavits of the jurors, except when the verdict is arrived at by resort to the determination of chance. *Boyce v. Cal. Stage Co.*, 25 Cal. 460.

By the COURT:

The appeal is from the judgment and from the order of the court denying a motion for a new trial. The action was for damages for personal injuries charged by the plaintiff to have been inflicted by the defendant upon the plaintiff.

The complaint charges that the plaintiff was of the age of seventy years, in feeble health, and having previously lost the sight of one of his eyes before the injuries complained of were inflicted by the defendant. That the defendant made a violent assault upon his person, by means of which his remaining eye was destroyed. Plaintiff asked for damages in the sum of twelve thousand dollars.

The answer alleges that the plaintiff made the first assault, and denies that the defendant did in any manner wound or hurt the plaintiff. The jury rendered a verdict in favor of plaintiff for the sum of two thousand dollars.

Among other matters, it is assigned as error by counsel for the appellant: "That after the case had been given to the jury and they had retired, they returned into court and asked for and received instructions from the court in the absence of the defendant's counsel; also, that the verdict

of the jury was received in the absence of the defendant's counsel, and that on neither of these occasions was the counsel for the defendant called." It does not, however, appear from the statement that the defendant himself was absent on either of the occasions referred to.

It was not error for the court to give instructions to the jury upon their returning into court, as stated in the transcript, in the absence of the counsel for the appellant, if the defendant was himself present, and his presence will be presumed unless his absence is shown. Comp. Laws, 412, sec. 170. Though the proper and better practice is, in such cases, that the counsel be called. Nor was it error to receive the verdict of the jury in the absence of counsel for the defense.

There is no provision upon the subject in the civil practice act, and no authority is cited by counsel sustaining the position that so to receive the verdict is erroneous.

An affidavit of one of the jurors was incorporated in the statement on which the motion for a new trial was based, to the effect that he, the juror, did not agree to the verdict.

The minutes of the court show that the verdict was in writing, signed by the foreman of the jury, that it was recorded in the presence of the jury, was then read to the jury by the clerk, and the jury asked if that was their verdict, and they said it was. It is not admissible in such a case to receive an affidavit of a juror to impeach the verdict. There was no error in the instructions given by the court; on the contrary, we think the law of the case was clearly stated in the charge of the court.

Insufficiency of the evidence to justify the verdict was one of the grounds upon which the motion for a new trial was urged, and, as it appears to us, much the strongest if not the only plausible ground upon which the motion for a new trial was based.

The evidence as set out in the statement is certainly very meager upon the question as to the responsibility of the defendant for the injuries received by the plaintiff in the altercation, but we are not prepared to say that the jury might not, from the evidence, believe the defendant responsible for the injuries received by the plaintiff.

The judgment must be affirmed, and it is so ordered.

MURPHY & DENNIS, PLAINTIFFS, v. CHARLES
WHITLOW, DEFENDANT.

IN ACTION AGAINST SURVIVOR OF TWO MAKERS OF PROMISSORY NOTE, after evidence that a partnership existed between them has been introduced; it is not error for the court to instruct the jury that if they believe that the defendant had been notified that such note was out, signed by himself and the deceased, and that when called on to pay the note he did not deny the authority of the deceased to make it, but on the contrary, promised to pay the same, then the defendant is liable on the note.

WHERE PARTY INTRODUCES TESTIMONY, HE CAN NOT AFTERWARDS OBJECT TO IT on the ground that it is irrelevant. Nor can he object to the court's instructing the jury in reference to it, for if it is really irrelevant, there is all the more reason why the court should comment upon it so far as to prevent the jury from being misled by it.

MANNER IN WHICH JUDGE DELIVERED HIS CHARGE TO THE JURY will not be considered on appeal to this court, unless it was made a ground of the motion for a new trial, and was supported by affidavit.

APPEAL from the district court of the third judicial district, Maricopa county. Action on a promissory note. The opinion states the facts.

G. H. Oury and J. T. Alsap, for the appellant.

Whitlow was not the partner of Beatty, nor did Murphy & Dennis give him (Beatty) credit upon any conduct or representation of Whitlow leading them to believe that such partnership existed, and therefore Whitlow can not be bound. *Hendrie v. Berkowitz*, 37 Cal. 113; *Dezell v. Odell*, 3 Hill, 215; S. C., 38 Am. Dec. 628; *Reynolds v. Lounsbury*, 6 Hill, 534.

The subsequent promise to pay was after Whitlow had been appointed administrator of the estate of Beatty, and this was sufficient notice to Murphy & Dennis, that no such partnership existed, as under the law a surviving partner can not administer. Acts of 1873, sec. 52, p. 109.

The subsequent promise to pay by Whitlow was not in writing, was without consideration, and, therefore, void under the statute of frauds. Comp. Laws, c. 36, sec. 12, p. 336.

The fact that Whitlow did not object to the execution of the note by Beatty does not bind him, as no one can be bound by implication for the acts of another. *Merrin v. Andrews*, 10 Wend. 463.

The charge of the court, in relation to the disposal of the mules purchased by Beatty, misled the jury as to the real issue in the case, prejudiced them against the defendant, and was error for which a new trial should have been granted. *Gillet v. Phelps*, 12 Wis. 392; *Wardell v. Hughes*, 3 Wend. 418.

The testimony of the witness Wilson was reasonable and consistent, was not rebutted or contradicted, nor was any attempt made to impeach it by counsel, and the implied suspicion of its truth, shown by the manner and language of the court, was without reason, tended to prejudice the jury against the witness and his testimony as well as against the defendant, and was error. *Wardell v. Hughes*, 3 Wend. 418.

John A. Rush, for the respondents.

Strict proof is not required to establish partnership of defendants when necessary to be established by plaintiffs. The proofs in this case are sufficient to establish the partnership of Whitlow and Beatty. 2 Greenl. Ev., secs. 483, 484.

If defendant Whitlow, at the time knowledge of the note was brought home to him and payment demanded by plaintiff, did not deny the partnership, and made no objection to the execution of the note in the partnership name by Beatty, then he is estopped from denying the partnership and ratified the act of Beatty. 2 Kent's Com. 615, 616; 2 Greenl. Ev., secs. 66, 69; *Jones v. Clark*, 42 Cal. 193.

When a party has made representations, either by acts or declarations, and others have acted and relied upon the same, the party making them is afterwards estopped from denying the same as true, and equally so whether the representations be true or false. 2 Parsons on Cont. 793, and note *q*, 800.

The plaintiffs in this case, by the acts of defendant, were induced to believe that the partnership had existed, that the note had been executed by Beatty by authority, and that defendant as surviving partner was liable, and so believing and relying upon defendant as surviving partner, neglected to proceed against the estate of Beatty, final settlement of the estate of Beatty having been had. If defendant is per-

mitted to deny the representations so made to plaintiffs, then by his, defendant's, own wrong he deprives plaintiffs of their debt.

By COURT:

This was an action on a promissory note signed by Whitlow & Beatty. Whitlow was sued as surviving partner of the late firm of Whitlow & Beatty. The complaint alleges the partnership and other essentials in form not objected to by the defendant. The defendant answers, denying the partnership, execution of the note, and indebtedness. The case was heard with a jury. Plaintiff introduced evidence to show that the defendant and Beatty, whose name was signed to the note with that of defendant, had held themselves out to the public as partners; that Beatty had executed and delivered the note as a partnership note; that payment of the same was demanded of defendant; that he promised to pay, not denying the authority of Beatty to make the note. The note was put in evidence, with an indorsement of the payment of two hundred dollars thereon.

Defendant introduced evidence denying the partnership, alleging that when he promised to pay the note he was acting as administrator of the estate of Beatty, deceased, and that he promised as administrator, not as personally liable; alleging that he did tell one of the plaintiffs at the time of the demand or conversation about the debt, that Beatty had no authority to pledge defendant for payment. The foregoing evidence was the testimony of defendant himself.

Defendant introduced other evidence, viz., that of one Wilson, his book-keeper, to the effect that though the payment of two hundred dollars on the note had been made by his book-keeper, it was without authority, that the mules, alleged by plaintiff to have been given to defendant in consideration of the note by delivering them to Beatty, had been bought by Beatty with six hundred dollars, given him for that purpose by defendant's book-keeper, as instructed by defendant; and that when Beatty brought them to defendant's place of business, he claimed the mules as his own property, took them off on a journey for about a week, when he returned turned them into defendant's corral, and in a

few days Beatty was killed. The book-keeper says he credited Beatty on his books with the mules, having charged him with the six hundred dollars; that defendant took and used the mules, sold some of them, had some of them yet; that he made this credit on the books to Beatty for the mules without any instructions from either Beatty or defendant; that Beatty had made no disposition of the mules after he had returned from the journey mentioned; and that defendant was absent from home at the time he, the book-keeper, credited Beatty on the books with the mules.

The jury having been charged, found for plaintiffs. Defendant moved for a new trial, assigning error of law in the charge of the judge. Motion denied. Appeal from the order refusing new trial.

The judge charged as follows, among other charges: "If the jury believe from the evidence that the defendant, with knowledge of the existence of the said note, made no objection to plaintiffs against the authority of Beatty to make it, when called upon to pay it, but promised plaintiffs to pay it, he thereby ratified the act of Beatty and became liable." This is assigned as error. We see no error in this charge. It was not undertaking to answer for the default of another. The charge says, if the jury believe defendant had knowledge of the note, the note is the note of Whitlow & Beatty. To have knowledge of that note is to know that it is signed in that manner; that it is the signature of a partnership; it is a firm name; there was evidence before the jury that there was such a firm, and that defendant was a member of it. It was not error to say to the jury, with that evidence before them, that if they believed defendant had been notified that a note was out signed "Whitlow & Beatty," had been called on to pay it, had not denied the authority of Beatty to make the note, but on the contrary, promised to pay it, he was then liable on the note.

The court further charged: "It is not my province to say what is proven, or what is not proven; of that you are the sole judges. But I have the right to call the attention of the jury to important points in the testimony: The manner in which the defendant obtained the mules purchased by Beatty. According to the testimony of Wilson, it would seem that the mules were brought by Beatty to defendant's

place, and claimed by Beatty as his mules, and were by him taken to McDowell, and brought back to defendant's place by Beatty on the Wednesday before his death. The witness Wilson, according to his own testimony, without one word having been said to him either by Beatty or the defendant, credited Beatty, on his account with defendant, with the mules on the day of or day preceding the death of Beatty; and it appears from the testimony of Wilson, that defendant took possession of the mules, and has retained possession of them ever since. If the defendant was the partner of Beatty, he had a right to the possession of the mules as surviving partner, and if he was not partner, then the mules belonged to the estate of Beatty, according to the testimony of Wilson, and should have been administered upon as the property of the estate, and used to pay the debts of Beatty."

This the second assignment of error. It is urged that it was error to comment on this testimony, because it is claimed the testimony is not relevant to the issue in the case. But all this testimony was introduced by the defendant and admitted without objection. Defendant can not now object that the testimony was irrelevant. The testimony was in, it had gone to the jury, and if it were really irrelevant, all the more reason why the judge should comment upon it, so far as to prevent the jury from being misled by it. The purport of the evidence seemed to be, that because the defendant had the mules in his possession, they were his individual property. The judge explained to them that if the defendant was a partner of Beatty, then the mere fact of his having possession of the mules would prove nothing, because as surviving partner he would have been entitled to the possession; that if he was not a partner, then, according to the testimony of Wilson, the mules belonged to Beatty, and defendant, being administrator of Beatty's estate, would have been entitled to the possession of the mules as such administrator.

Certainly, it is a correct proposition of law that a surviving partner is entitled to the possession of the personal estate of the partnership, pending administration, as also that as administrator in the case shown, if the property be-

longed to Beatty, defendant was entitled to the possession of it.

It is urged that he could not have been administrator and partner at the same time, but that is a collateral matter. His appointment as administrator might have been resisted in the probate court, if it were shown that he was a partner, but such a question can not be considered here in this case on the present record.

It is further urged—and this seems to be relied upon as a serious ground of objection to this error that, as stated in the words of the transcript, “this recapitulation by the court of Wilson’s testimony was made with a manner and emphasis indicative that the court regarded the testimony as extremely suspicious.” Whether the manner in which a judge delivers a charge, or the peculiar emphasis with which he pronounces it, can be assigned as error, is not before us. It is sufficient to say that it is not properly assigned here. The appeal here is that it was error to deny a new trial. If it was claimed that a new trial ought to have been granted for that the defendant was unfairly prejudiced before the jury by the court, it should have been charged as irregularity in the proceedings of the court, coming under the first of the seven grounds for new trials, and the application should have been supported by affidavit. That is the mode prescribed by the statute, and it can not be properly presented or raised in any other way. A judge may have been entirely unconscious of the fact that his manner of addressing the jury was thought to unfairly prejudice them in any way in the case. If the charge is deliberately brought before him on motion for a new trial, and affidavits filed with it showing what persons consider that his manner was unfair, and to what extent they think it was calculated to prejudice either party, he, as also the appellate court, is in a position to judge whether a new trial ought to have been granted or not. But when parties have not thought the matter of sufficient importance to present it properly, or for any cause have not in fact done so, the question can not of course be considered on appeal.

The order denying a new trial, and the final judgment are hereby affirmed.

RICHARD WOFFENDEN v. PEDRO CHARAULEAU.

PROPERTY PURCHASED WITH PROCEEDS OF SALE OF WIFE'S SEPARATE PROPERTY becomes the separate property of the wife, and the rents and profits of her separate property are as absolutely hers, and as completely under her control, as is the property of which they are the fruits.

ACT OF 1871 GIVES WIFE PERFECT FREEDOM IN CONTROL, USE, AND ENJOYMENT of her separate property, and makes her wholly independent of her husband in regard thereto.

APPEAL from the district court of the first judicial district, county of Pima. The opinion states the case.

Titus and Hughes, for the appellant.

This is an appeal by the defendant, from a judgment in favor of the plaintiff for damages in forcible entry and detainer.

1. In an action for damages in forcible entry and detainer, the defendant is not precluded by the previous judgment of restitution from showing title, or any other fact in bar or mitigation of damages. This is especially true of cases in which damages are claimed which do not necessarily result from the alleged entry or detainer; and the court erred in ruling otherwise in the present case. Comp. Laws, p. 369, sec. 24; *Warburton v. Doble*, 38 Cal. 619; *Shelby v. Houston*, Id. 410; *Swain v. Marsh*, 12 Id. 283; *Willson v. Cleaveland*, 30 Id. 102; *Miller v. Munice*, 6 Hill (N. Y.), 114.

2. In an action of damages for forcible entry and detainer, in which damages are claimed which do not necessarily result from the alleged forcible entry and detainer, such damages are subject to the same proofs and set-off as similar claims in any other action; and the court erred in ruling otherwise in the present case. Comp. Laws, p. 393, sec. 46; Id., p. 394, sec. 47, cl. 1; 2 Hilliard on Torts, 319; *Gogel v. Jacoby*, 5 Serg. & R. 117; S. C., 9 Am. Dec. 339; *Heck v. Shener*, 4 Serg. & R. 249; S. C., 8 Am. Dec. 700; 2 Story's Eq. Jur., sec. 1437.

3. If the plaintiff in forcible entry and detainer continues peaceably and quietly in possession of the property in controversy for months after the alleged forcible entry and detainer, and then voluntarily leaves such premises without any disturbance, he is thereby estopped from recovering

damages in such case, especially if his own conduct contributed to induce the forcible entry and detainer complained of; and the court erred in ruling otherwise in the present case. *Slaughter v. Fowler*, 44 Cal. 195; *Page v. O'Brien*, 36 Id. 559; *Thompson v. Smith*, 28 Id. 527; *Morton v. Folger*, 15 Id. 275; Wharton on Neg., sec. 300.

4. In the territory of Arizona, since the act of 1871 relating to married women of the age of twenty-one years and upward, all property owned by them before marriage, as well as that acquired afterward, together with the fruits of the same, are separate property, and there is here, therefore, no such presumption as that any portion of such property or its fruits are common property, nor that the husband is entitled to the control or disposition of the same. Nor are such women, or those who claim through or under them, bound to furnish greater or other evidence of title or ownership than other parties litigant; and the court erred in ruling otherwise in the present case. Comp. Laws, p. 310, sec. 1; Id., p. 305, sec. 1; *Miller v. Fisher*, Sup. Ct. of A. T., Jan. term, 1875, ante, p. 232; *Eurl v. Grim*, 1 Johns. Ch. 494; *Philipps v. Chamberlaine*, 4 Ves. 51; *Fox v. Phelps*, 17 Wend. 393; *Shrewsbury v. Shrewsbury*, 1 Ves. 227; *Ladd v. Ladd*, 8 How. 10; 2 Story's Eq. Jur., sec. 1368; *Selover v. Am. Russ. Com. Co.*, 7 Cal. 266; *Magee v. Scott*, 9 Cush. 148; 1 Greenl. Ev., sec. 74; *Lewis v. Johns*, 24 Cal. 98; Comp. Laws, p. 360; *George v. Ransom*, 15 Cal. 322.

5. In Arizona husband and wife may contract with each other, and their contracts bind them mutually. They are therefore bound by a contract with each other, the one not to interfere with the property of the other, or its fruits, especially when such contract is made to promote domestic harmony; and the court erred in ruling otherwise in the present case. Comp. Laws, p. 305, secs. 1, 3; Id., p. 310, sec. 1; *Miller v. Fisher*, Sup. Ct. of A. T., Jan. term, 1875, ante, p. 232; *Garlic v. Strong*, 3 Paige Ch. 440; 2 Story's Eq. Jur., secs. 1368, 1380; Kent's Com. 161, 166; *Bullard v. Briggs*, 7 Pick. 533; S. C., 19 Am. Dec. 292; *Needham v. Sanger*, 17 Pick. 500; *Selover v. Am. Russ. Com. Co.*, 7 Cal. 266; *Miller Newton*, 23 Id. 554.

6. Since the Arizona act of 1871, relating to married women of the age of twenty-one years and upwards, such

women, when not joined by their husbands, may acknowledge their deeds before justices of the peace, and they need not be examined separate and apart from their husbands. The court erred in ruling otherwise in the present case. Comp. Laws, 310, sec. 1; Id. 305, sec. 1; Id. 360, sec. 4; *Miller v. Fisher*, Sup. Ct. of A. T., Jan. term, 1875, *ante*, 232; *Elliott v. Osborne*, 1 Cal. 396; *Blood v. Humphrey*, 17 Barb. 660; Abbott's N. Y. Dig., tit. Acknowledgment of Deeds.

7. The acknowledgment of November 2, 1875, upon the deed of February 11, 1874, if valid in other respects, related back to the making of the same, and constituted it competent evidence, without further sanction or proof, against all but *bona fide* purchasers without notice; and the court erred in ruling otherwise in the present case. *Johnson & Wife v. Stagg*, 2 Johns. 209; *Jackson v. Bard*, 4 Id. 230; *Heath v. Ross*, 12 Id. 140; *Stark v. Barrell*, 15 Cal. 361.

8. The wife is the agent of her husband in the custody and preservation of his property, and neither she nor those who act under her orders, therefore, are liable to him for preserving or even disposing of such property as he has abandoned to waste or destruction. The court erred in ruling otherwise in the present case. *French v. Braintree Man. Co.*, 23 Pick. 216; *Davis v. Butler*, 6 Cal. 510; *McGoon v. Aukeny*, 11 Ill. 558.

9. It was error in the judge who tried this case to indulge thereupon in such reflections on the counsel of defendant, or his mode of conducting the case, as tended to disparage the same with the jury.

10. The verdict in the present case is not justified by the evidence; it is against the law, and ought not to stand. Even if the verdict in the present case should be allowed to stand, it is excessive and ought to be reduced. Comp. Laws, 415, sec. 195, cl. 6; Id. 375, sec. 6.

Farley and Pomroy, for the respondent.

1. There should be a certificate of the judge or attorneys to the statement that it has been allowed and is correct, or that it has been agreed upon and is correct. Comp. Laws, 437, sec. 343.

2. The statement should have been filed within twenty

days after rendition of judgment. *Macomber v. Chamberlain*, 8 Cal. 322; *Harper v. Minor*, 27 Id. 115; *Ryan v. Dougherty*, 30 Id. 221.

By Court, TWEED, J.:

The appeal is from the first district, Pima county. Counsel for the respondent, before submitting his argument upon the merits of the case, asked to be heard upon a preliminary motion to strike out from the transcript certain portions thereof as not being properly certified, citing the twelfth rule of this court as entitling him to be heard upon such motion.

The rule invoked reads as follows: "Exceptions to the transcript, the bond or undertaking on appeal, or the notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the rights of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such case, the objection must be presented to the court before the argument on the merits."

On the tenth of January the case was set for argument on the thirteenth. It was not reached until the twenty-fourth of that month. On the twenty-first the counsel for respondent noted in writing and filed his objections to the transcript, and on the twenty-fourth, when the case was called for argument, asked to be heard upon his motion to strike out. The court declined to hear the motion argued, and counsel for the respondent excepted to this ruling.

The object of the rule is obvious. It is intended to enable the court, as early as is practicable, to dispose of all preliminary objections to a hearing upon the merits of the cases to be brought before it for consideration. To hear such objections as early as possible for its own convenience and for the convenience of the appellant who might be permitted, in case of error or mistake in copying exhibits or otherwise, to correct the same in season for a hearing at the term. The rule requires that the exceptions to the transcript be noted at least one day before the argument, or that they be disregarded.

When a case is set for argument, and no exceptions are noted and filed before the day so fixed, we think all exceptions to the transcript should be deemed to be waived. It was with this view of the intention and spirit of the rule cited that we declined to hear the motion of respondent's counsel; and we take occasion to say here, that while we do not wish to encourage any laxity in practice in appeals to this court, we shall avoid as far as possible allowing technical objections to stand in the way of a hearing upon the merits of such cases as may come before us.

There are obvious reasons why the supreme court of a territory like ours should, by liberal rules liberally construed, aid litigants to obtain a hearing upon the merits of cases brought before it by appeal.

We will now consider the case as presented to us. On the second day of July, 1875, a judgment was rendered by the judge of the district court, first district, Pima county, in favor of the plaintiff herein, in an action then pending in said court for forcible entry and detainer, wherein the plaintiff herein was plaintiff, and the defendant herein was defendant.

The premises in controversy in that action, and for which judgment of restitution was had in favor of the plaintiff, were three quarter-sections of land lying contiguous to each other in Pinal county, and known as the Robledo, Moreno, and Duran ranches. The plaintiff in this action asks to recover the rents and profits of the premises above mentioned from the tenth of April, 1874, up to the second of July, 1875, the period, as is alleged, during which the defendant wrongfully withheld the premises from the plaintiff. Also to recover the value of a quantity of corn and a growing crop alleged to have been upon the premises at the time of the unlawful entry of defendant, and by him converted to his own use; and, among other articles of personal property, two horses and three yoke of oxen, of the alleged value of two hundred and fifty dollars, etc.

The defendant in his answer claims ownership of the premises described in the complaint, admits that plaintiff was owner of one half of the growing crop, denies plaintiff's ownership of the horses and oxen, and alleges that he, the defendant, is the owner thereof.

On the trial the defendant introduced evidence tending to show that certain of the personal property, the oxen and horses, were purchased by him from Anna C. Woffenden, the wife of the plaintiff, and that this property was purchased by her separate means, and was her separate property. Transcript, folios 61, 62.

Testimony of plaintiff upon cross-examination, where plaintiff, in answer to questions touching the purchase of this property, says: "I got that property at home; my wife bought it; she bought it with money belonging to both of us; what is hers is mine; I did not furnish any money directly to pay for it; I did not furnish any money." See also testimony of defendant, folio 81.

Among other instructions, the court charged the jury as follows: "The title to the ranches is not here in question, nor to be considered by you. Whatever of the other property in controversy was acquired by the plaintiff and his wife subsequent to their marriage is common property, and as such subject to the management and disposition of the husband, and the wife had no authority to sell the same, unless you find that she was authorized thereto by her husband as any other agent might be. The presumption of its being common property would be removed if you find that said property was taken in exchange for the separate property of either spouse, or was acquired by gift, bequest, devise, or descent; but such proof must be clear and satisfactory. * * * You must also find that said property was owned by her before marriage with the plaintiff, or acquired afterwards in the manner above described, in order that she might give a complete title thereto as against her husband; or you must find that she was the authorized agent of the husband to sell the same," etc.

The court also gave the following instructions: "If you find that any of the property in controversy is rents, issues, and profits of the separate property of either spouse, it is common property by the laws of this territory, and subject to the management of the husband, with like power of disposition as over his own separate estate, and no marriage contract in derogation of these rights is of any force or effect."

The jury rendered a verdict for the plaintiff for one thou-

sand dollars, itemized as follows: For one half of the crop of 1874, seven hundred and fifty dollars; three yoke of oxen valued at one hundred and fifty dollars; one horse valued at forty dollars; and fifteen hundred pounds of corn valued at sixty dollars.

Both these instructions were excepted to by counsel for the defendant, and their being given is assigned as error. In the first of these instructions we understand the learned judge to charge to the effect that to constitute separate property in the wife, when the property is obtained after marriage, it must have come to her by gift, bequest, devise, or descent, or it must have been obtained in exchange for her separate property; that she could not sell any portion of her separate property and invest the means derived from such sale in other property, and hold the same as a part of her separate estate, but that such property so purchased would become common property, and subject to the management and disposal of her husband.

Both of these instructions are erroneous. The first section of the act of January 22, 1871, entitled "An act relating to the separate property of married women," reads as follows: "Married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property, and may convey and transfer lands or any estate or interest therein vested in or held by them in their own right, and without being joined by the husband in such conveyance, as fully and perfectly as they might be if unmarried." The second section repeals all acts and parts of acts so far as they conflict with these provisions.

The sole and exclusive control and the right to convey as if unmarried given by this statute to the wife involves the right so to control and convey for her own separate use and benefit; it involves the right in the wife to sell any of her separate property, and to invest the proceeds of such sale in the purchase of other property for her own use; it also involves the right of the wife to the rents and profits of her separate property, and its use by her in the investment of the same as she may choose.

To say that the wife shall have the sole and exclusive control of her separate property, and that she may sell and transfer the same as if unmarried, and then to attach to such

right the condition that when in controlling such property she receives the rents and profits thereof, such rents and profits shall become common property and under the exclusive management of the husband, and that when she sells and conveys her separate property, the receipts of such sale, or the property in which she invests such receipts, shall become common property and pass wholly beyond her right to use the same, or her control thereof, is affixing a condition to the right given to her which utterly destroys the right itself.

We have no doubt that under this statute the rents and profits of the wife's separate property are as absolutely hers, and as completely under her control, as the property of which they are the fruits; and that she may use such rents and profits and the proceeds derived from the sale of any of her separate property in the purchase of other property, and that such property so purchased will remain a part of her separate estate; and we have no doubt that every provision of our statutes in force when this act of 1871 was passed, limiting the rights or powers of the wife as to her separate property by making the rents and profits thereof, or the receipts for the sale thereof, or the property purchased therewith, common property to be managed and controlled by the husband, was in conflict with the provisions of this act, and was repealed by the repealing clause thereof.

If the instructions under consideration are correct, from the day of the wife's marriage, however ample her separate means may be, she is wholly deprived of their use and enjoyment. She may not gratify her taste by the purchase of a single article for the adornment of her person, nor bestow upon a needy relative, be the same father, mother, brother, or sister, such aid as their needs may require and such as she may desire to relieve; she may not even of her own fortune provide for the education of her own children if she have such when married, but must depend wholly upon the will or whim of her husband in the use of means which may have been acquired by her own labor, learning, and skill before her marriage:

Practically, this ruling places the wife in the same *status* in which she stood under the act of 1865 as to her separate property, the only effect given to the act of 1871 being to-

give the barren right to convey without being joined with the husband, and places the proceeds of her separate property, as well as the rents and profits thereof, wholly in the hands and under the control of the husband.

The act of 1865, above referred to, in its first section prescribes that "all property, both real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property."

The second section provides that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

The ninth section of the same act takes from the wife all beneficial interest in her separate property by giving to the husband the management and control of the same, and the rents, issues, and profits thereof, making the rents, issues, and profits common property.

It was doubtless the intention of the legislature, by the act of 1871, to get rid of the obnoxious provision in the act of 1865, by which the wife's separate property became in effect common property and subject to the management and control of the husband. The act of 1871 gives to the wife perfect freedom in the control, use, and enjoyment of her separate property, and makes her wholly independent of her husband in regard thereto.

We hold further, that the act of 1871 adds another method to those provided in the second section of the act of 1865, by which the wife may acquire property after marriage; that the right to the sole and exclusive control of her separate property, and the right to sell and convey the same free from the interference of her husband, involves the right in her, and for her own use, to purchase property with the means she may derive from such sale, or by the investment of the rents and profits of her separate estate.

These views accord with the decision of this court at this present term in the case of *Charauleau v. Woffenden*, ante, 243.

The instructions as given must be presumed to have influenced the jury in their verdict as to certain of the personal property in controversy.

We do not deem it necessary to pass upon other matters occurring at the trial and assigned as error.

The judgment must be reversed, and the cause remanded for a new trial; and it is so ordered.

PORTER, J., concurred.

DUNNE, C. J., delivered the following dissenting opinion:

I dissent. 1. The same condition of facts exists in this case as to the objection to the statement as in the case of *Charauleau v. Woffenden*, decided at this term of the court, and for the same reasons there stated I consider there is nothing before this court in this transcript but the judgment roll, in which no error appears, and that the judgment for that reason should be affirmed.

2. Accepting, however, the unauthenticated statement as true, it appears therefrom that plaintiff had obtained judgment against defendant for forcible entry and detainer of certain premises. He then brought his action for damages consequent and attendant upon said entry and detainer, under Comp. Laws, 369, sec. 24.

He alleged three thousand six hundred dollars damages for rents and profits, and one thousand eight hundred and ninety dollars damages for personal property on said premises taken by defendant at the time of entry. There are two crops spoken of in the testimony, the crop of 1874 and the crop of 1875. As to the crop of 1874, defendant admits its value to be as charged in the complaint, but claims he owned one half of it.

The crop of 1875 defendant claims was planted by him during the time he was adjudged to be in unlawful possession of the premises. Defendant undertook to prove the value of the crop of 1875, to show that he had placed articles of value on the premises, of which plaintiff got the benefit, and defendant stated that he offered proof on this point as having a bearing on the question of damages. Excluded, wherein appellant assigns error No. 1.

We are governed here by the common law in the absence of statutory provisions; at common law a trespasser could not prove value of improvements made by him as a set-off to damages for trespass. By statute here in ejectment, where

defendant enters in good faith under color of title adverse to plaintiff, he may prove value of improvements made by him as a set-off against damages. But there is no provision for doing it as against damages for forcible entry and unlawful detainer. The exclusion was not error.

Assignment No. 2 is, that the court refused to allow defendant to prove ownership of the premises on which it had been adjudged he had forcibly entered, the value of the crop of 1874, and the animals in contest, in mitigation of damages. It was not error to exclude evidence of title in defendant. Title of the land could not be raised in this action; and concerning the allegation that it was error to exclude evidence of the value of the crop of 1874, there is nothing in the transcript to show that any evidence was offered concerning the value of the crop of 1874; besides, the defendant admitted in his answer the value of the crop of 1874 to be as charged in the complaint. The latter portion of the assignment, that the court excluded evidence of the value of the animals in question, is not warranted even by the unauthenticated statement. The unauthenticated statement shows no such exclusion, but on the contrary, shows that evidence as to the value of the animals, and all about their purchase, and that of other property and its value, was admitted without objection.

Assignment No. 3 was for refusal to permit defendant to ask a certain question at a certain time. Even if that were error, the unauthenticated statement shows it was cured by allowing the same question to be asked later in the examination of the same witness.

The fourth assignment of error is a duplication of assignment No. 2—that the court excluded evidence of title to the land—and is answered in the remarks on that assignment.

The assignments from 5 to 15 inclusive are for error in instructions. The only one of these instructions about which I understand there is serious contest is No. 10, instructing the jury that the rents, issues, and profits of the separate property of either spouse are common property, under the law of this territory. It is argued that the adjudications of the supreme court of California are against the doctrine of this instruction. Section 9, page 307, of our compiled laws, declares in express terms that the rents and

profits of the separate property of either spouse are common property.

Our law on this subject is taken from the California law. Section 9 in the California law is the same as our section 9. In 1860 the supreme court of California construed section 9. We adopted section 9 in 1865, presumptively with notice of the construction given to it in California. The supreme court of California held that section 9 of the California law was inoperative in its declaration that the rents and profits of the wife's separate property should be common property. But why?

Because it was, as they say, in conflict with the constitution of California, and that the legislature had not the power to modify the law of the constitution; that the constitution gave to the wife separate property; that at common law a right to separate property gave the right to the rents and profits thereof as separate property also; and that the legislature had no power to say it should be otherwise. But in this territory the matter is not governed by constitutional provision; all the rights the wife has are fixed by the legislature. Our legislature has power to say the wife shall have no separate estate at all. It has power to say just what estate she may have is separate property. They have said that she shall have what the court in California calls a reversionary interest; one which, the court continues, can "be of no avail to her except in the contingency of her surviving her husband." The court speaks of it as a "barren right." But is it such a great anomaly to allow the head of the family to control the usufruct of his wife's property, and dispose of it for the maintenance and care of the family, the support and education of the children, and to have some enjoyment of it also himself, perhaps, while the property itself is put safely beyond his control? He can not divest the wife of the property owned by her; that is secured for her children if she so desire. Is there anything against public policy or *contra bonos mores* in such a law? Have not the legislature of Arizona power to make such a law if they like? If they choose to adopt one feature of the law of California recognizing separate property in the wife, have they no power to say that certain conclusions drawn therefrom by the courts of California shall not obtain in Arizona? Five years after

that decision was rendered in California, declaring that rents and profits followed the separate estate and were separate property in that state, the legislature of Arizona deliberately declared that in Arizona the rents and profits should be common property. What is to hinder their doing so? There is no parity in the legislation on the subject. In Arizona it is all the act of the legislature. In California the law is partly statutory and partly constitutional, and of course nothing in the statute may contravene the constitution. But make the cases similar: Suppose that section 14 of article 11 of the California constitution were followed by a section declaring that though certain property should be the separate estate of the wife, the rents and profits of that estate should be common property, would not the courts give force to both sections? Necessarily they would, because both sections would then be of equal authority, and would be capable of standing together. So they are in this territory. The statutes are all of equal authority, are all *in pari materia*, must all be taken together, and force given to all.

There is a fourth objection, that the verdict is contrary to the evidence. There was no motion for a new trial. Such an objection is available only on motion for a new trial, so as to give the court an opportunity to submit the case to another jury. The objection can not properly be considered here. But nevertheless, what is the objection? The only controverted facts on which the jury gave a verdict were as to the ownership of three oxen and one horse. The only evidence as to the ownership of this property was that of the plaintiff, from whose wife defendant claimed to have bought this property. He said in substance: "My wife did not own any of this property before marriage; it was all acquired since. My wife bought it with money belonging to both of us. What is hers is mine. I did not furnish any money directly to pay for it. I did not furnish any money." Plaintiff showed he had used these animals in putting in his crop. On this evidence, in substance, the jury by their verdict practically declared that this was common property. Even if it should be conceded that this was against the evidence, what power did the court below have to correct it? The court was bound to receive the verdict. The defendant did not ask for a new trial. The court

was, therefore, compelled to enter judgment. The defendant can not now raise any objection to the verdict on that ground. He had his day in court on that point, and allowed it to go without objection.

The last objection urged is that the verdict is excessive and ought to be reduced. Plaintiff was entitled to the value of the rents and profits of the premises. He gave evidence that the use of the premises was worth one thousand five hundred dollars for the time they were withheld. The defendant admitted that plaintiff owned one half of the crop of 1874, and that that one half was worth seven hundred and fifty dollars, and owned corn worth sixty dollars, making eight hundred and ten dollars.

That was all the jury gave him, except one hundred and ninety dollars for three yoke of oxen and one horse. I do not think the verdict was excessive, particularly when in an action like this the law says the damages may be trebled. The damages were not trebled in this case, nor raised in any amount beyond that awarded by the jury, and no motion was made for a new trial on the ground that the damages given were excessive. I am therefore of opinion that the judgment should be affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1877.

**HENRY W. FLEURY v. CALVIN JACKSON AND
W. J. TOMPKINS.**

UNLESS NOTICE OF APPEAL IS FILED WITHIN ONE YEAR from the date of the rendition of the judgment appealed from, the appeal will not be entertained by the supreme court.

APPEAL FROM ORDER DENYING NEW TRIAL CAN NOT BE SUSTAINED when the order from which the appeal is taken is not brought before this court in the record.

APPEAL from a judgment of the district court for the third judicial district, county of Yavapai, and from an order denying the plaintiff's motion for a new trial. The judgment appealed from was rendered on the twenty-first day of November, 1873, and the notice of appeal was given on the tenth day of December, 1874. The other facts are stated in the opinion.

Murat Masterson and Farley & Pomroy, for the appellant.

John A. Rush, for the respondents.

By Court, FRENCH, C. J.:

The appeal from the judgment in this case can not be entertained, for the reason that the notice of appeal, the first step toward perfecting an appeal, was not filed until more than one year had elapsed after the rendition of the judgment appealed from.

The appeal from the order denying a new trial can not be sustained, because the order from which the appeal is taken is not brought before us in the record. The order appealed from should form the basis of the transcript on appeal. Comp. Laws, 437, secs. 344, 345, 348.

But if the order appealed from were in the record, it would be of no avail in this case. It fully appears from the record, and the arguments in this case, that there was a defect in the testimony; that plaintiff, who appears to have had a good cause of action, continuously failed, both on the trial and on his motion for a new trial, to make his case. On the trial failing for defects of testimony, and on his motion for a new trial utterly failing to make any legal showing why a new trial should be granted, the judgment and order must be affirmed, and it has been so ordered.

• JAMES M. SANDFORD v. ANDREW L. MOELLER.

OBJECTION THAT SPECIAL ISSUES SUBMITTED TO JURY did not cover all the issues in the case can not be taken for the first time in the supreme court. UNLESS STATUTORY REQUIREMENTS RELATING TO STATEMENT ON APPEAL ARE COMPLIED WITH, such statement will not be noticed on appeal, and the right to present such statement will be deemed to have been waived.

APPEAL from a judgment of the district court for the third judicial district, county of Yavapai, rendered in favor of the defendant, and from an order denying the plaintiff a new trial. The other facts are stated in the opinion.

Masterson, Howard, Southworth, and Goodwin, for the appellant.

Hargrave and Rush & Wells, for the respondent.

By Court, FRENCH, C. J.:

The jury in this case find on the special issues submitted to them: "1. That the plaintiff was not in prior possession by himself, or through his grantors, of the premises, or any part thereof, described in the complaint, on and before the months of February and March, 1868; 2. That the whole of the land in controversy was included in the military reservation known as Fort Whipple on the twenty-seventh day of April 1870."

Although the special issues submitted to the jury do not appear to have covered all the issues in the case, plaintiff made no objection to these issues as framed, or to the submission of the case to the jury on them, so far as the transcript discloses. It is alleged as one of the assignments of error, that the special issues submitted to the jury did not cover all the issues in the case. But this assignment was made for the first time in making up the record long after the trial of the case, and even here it is not alleged that plaintiff ever objected to the submission of the case to the jury on these special issues. The finding of the jury on these issues is decisive of the case; especially is the first one so decisive. We can not reach this verdict to disturb it on the record before us. The transcript contains a voluminous statement, in which many errors are alleged but not shown, and a large mass of redundant and irrelevant matter. The statutory provisions in regard to statement on appeal are found in sections 340 and 341, and the sections immediately following page 346 of the compiled laws. None of these statutory provisions have been complied with. It does not appear very clearly when the judgment was entered. But the decision was made on the twenty-fifth day of May, and the judgment was filed on the same day; the statement was served on the twenty-third of June following. This was not within the twenty days, and the three hundred and forty-first section prescribes the penalty, "he shall be deemed to have waived his right thereto."

We can therefore only consider the judgment roll, which showing no error on its face, the judgment must be affirmed, and it has been so ordered.

WILLIAM COLE v. CURTIS C. BEAN AND MARY M.
BEAN, HIS WIFE.

JUDGMENT AND DECREE MUST BE REVERSED, UNLESS SUSTAINED BY THE
PLEADINGS in the case.

DECREE DECLARING DEED TO BE A MORTGAGE IS NOT SUSTAINED by a com-
plaint which asks that such deed be canceled and held for naught, on
the ground that the grantor therein named was, at the time of its exe-
cution, incapacitated from making the deed, and that the execution of
the same was procured by fraud and conspiracy.

APPEAL from the district court of the third judicial dis-
trict, Yavapai county. The opinion states the case.

Masterson, Howard, and Farley & Pomroy, for the appel-
lants.

1. The chief principle which addresses itself to the ob-
jections in this case, and upon which the appellants princi-
pally rely, is, that the *allegata* and the *probata* must agree;
that the findings must be based upon the issues as made,
and that the decree should be supported by the complaint.
It will hardly be required of us to produce authorities to
support the proposition relative to the *allegata* and *probata*
agreeing; and that the findings and decree must be consist-
ent with and based upon the issues as made and as they
appear in the pleadings. We submit, however, the follow-
ing: 1 Greenl. Ev., sec. 51 et seq., and cases cited; *Green*
v. Covillaud, 10 Cal. 332, and cases cited; *Green v. Palmer*,
15 Id. 411; *Morenhout v. Barron*, 42 Id. 605.

2. The appellants claim that the court below erred against
these propositions:

a. When, against objections, it permitted the question to
be asked of the witness C. C. Bean, tending to elicit evi-
dence of a trust, as found on page 76 of transcript, line
2107.

b. When it admitted the testimony of D. C. Moreland
(against objection), tending to show a trust as given on page
101, line 2820, of transcript.

c. When it admitted the testimony of Robert Groom
(against objection), tending to show a trust as given on page
103, line 2861, of transcript.

d. When it found that the deed was not regarded as an absolute conveyance by either plaintiff or defendant at the time of its execution, nor at the time said defendant Mary M. Bean received it. But that said deed was given and received by both plaintiff and defendants for the purpose of protecting plaintiff from wasting his said interest in said Peck and Occident mines; and for the purpose of preventing plaintiff from deeding any portion of said Peck and Occident mines to persons objectionable to said partnership while plaintiff was so incapacitated by reason of said drunken debauch; and for the further purpose of securing to said partnership any sum which might be due to said partnership by said plaintiff at the time of making said deed. See transcript, page 122, line 3390.

e. When it found that the plaintiff was no longer in danger of wasting and squandering his property by reason of said incapacity induced by said drunken debauch; nor of conveying his interest in said Peck and Occident mines to objectionable persons by reason thereof. See transcript, page 122, line 3410.

f. When it found that there was a partnership known as the Peck Mining Company, of which said partnership plaintiff was a member. See transcript, page 122, line 3389.

g. When it found that said deed was a mortgage to secure to the Peck Mining Company any indebtedness by Cole to said company at the date of said deed. See transcript, page 120, line 3347.

3. The respondent, we presume, will doubtless admit the proposition first stated by us, but will contend that the court was justified in the findings under the seventh allegation of the complaint. We propose to confine ourselves to the seventh allegation first, and then to the whole pleadings.

The seventh allegation is as follows: "7. Plaintiff further alleges that he is informed and believes, and so charges the fact to be, that said defendant Curtis C. Bean, for the purpose of inducing plaintiff to make said conveyance, represented to plaintiff that he, the plaintiff, by reason of said intoxication and drunkenness, was incapable of looking after his own interest; that the said defendant Curtis C. Bean was the friend of plaintiff, and advised the plaintiff to make the said conveyance to enable him, defendant Curtis C.

Bean, to protect the interest of plaintiff while plaintiff was so incapacitated to attend to his business as aforesaid, and assigned as a reason why the said conveyance should be made to his wife, that he, the said Curtis C. Bean, was largely in debt beyond his ability to pay, and if the conveyance was made to him, the said Curtis C. Bean, it would subject the property to his debts." See transcript, page 3, line 78.

Is there anything in the allegation that would justify the court in finding and decreeing that the deed known as Exhibit 1, was a mortgage, and to have no other legal effect than as such mortgage, and is hereby declared invalid for all other purposes? See transcript, page 124, line 3441.

Does the seventh allegation set forth that Exhibit 1, although absolute on its face, was intended by the parties and given and received by them as a mortgage? Does it allege that there existed any indebtedness whatever between the said parties, and to secure said indebtedness was given by plaintiff to defendant.

The seventh allegation itself states that these representations, therein set forth as having been made by defendant, were made "for the purpose of inducing plaintiff to make said conveyance."

It does not state that plaintiff was moved to the making of said conveyance by said statements, nor that he delivered said conveyance for the purpose in said statement set forth. The findings state that the conveyance was given and received as a mortgage. Now supposing, for the sake of argument, that the conveyance was received for the purpose in said seventh allegation set out as having been represented to the plaintiff, is there anything saying that it was given for these purposes? Not a word, unless you infer that the representations having been made by the defendant they were acted upon by the plaintiff. But the inferential pleading of a material issue is not permissible; and the giving for this purpose is as material as the receiving. *Campbell v. Jones*, 38 Cal. 509.

Let us say that Bean got the worst of the bargain, and that the property proved itself worthless, but that he had already advanced on it money for the benefit of Cole, and he brought suit against Cole for the purpose of recovering

that money, the subject of the mortgage failing: would such an allegation be sufficient to bind Cole? Would it not be demurrable on the ground of not stating facts sufficient to constitute a cause of action, in this, that it is not stated that Cole gave the deed for such a purpose? And if not taken advantage of by demurrer, could it not be raised on the trial, and testimony sought to be introduced to show it objected to, since such a ground of demurrer is never waived? Now, allowing that this allegation does state that the conveyance was both given and received for the purpose therein stated, would those purposes constitute it a mortgage? What is a mortgage? The conveyance of an estate or property by way of pledge for the security of a debt, and to become void on the payment of it. 4 Kent's Com. 136; Bouvier's Law Dict., *verb.* Mortgages.

One of the elements of a mortgage is an existing debt. There is nothing in this allegation that a debt existed, that the plaintiff owed defendant anything, or that he owed anybody else anything. On what in this allegation, then, is the finding of mortgage based? Does it allege anything that would indicate in the remotest way that Exhibit 1 was considered by the pleader as a mortgage, or a deed by way of defeasance, and that he counted on such instrument as such? We submit that the most careful examination of this allegation by the court will fail to find any ear-marks whatever showing that the pleader when he pleaded that allegation intended to plead a mortgage. The complaint must be construed as a whole. *Farish v. Coon*, 40 Cal. 53, 54; *Aleman v. City of Petaluma*, 38 Id. 557. Construing the pleading, then, as a whole, it not only fails to state, even inferentially, that the conveyance was a mortgage, but absolutely shows that it was not the intention of the pleader to state such, and that such a thought did not enter his brain.

The plaintiff alleges in his complaint that there was no consideration. Could there be a mortgage without a consideration? The debt is the consideration; and the court has found there was a debt for which this deed was given as a security; and this it has found as one of the material issues in favor of the plaintiff, although he not only fails to raise it by his pleadings, but even precludes the possibility of inferring his intention to raise it, since he positively avers

a fact incompatible with such intention, namely, that there was no consideration. *People v. Irwin*, 14 Cal. 428, subsequently cited. This averment of the want of consideration bears most strongly against the pleader, and must be taken most strongly against him in this connection. *Bell v. Brown*, 22 Id. 671.

The prayer is supposed to contain the relief to which the plaintiff considers himself entitled. In this complaint plaintiff asks for cancellation of the deed, and sets up matter which, if true, would entitle him to cancellation only. This shows that no intention to plead a mortgage was entertained on the part of the pleader. Is this in the nature of a bill to redeem? From the decree one would be led so to believe; only that the case as presented by the findings and decree does not cover all the issues that would naturally have arisen had it been a bill to redeem. A bill to redeem under the facts as presented by the plaintiff in this case should allege that the deed, absolute on its face, was a mortgage; that the debt it was intended to secure was a debt due the Peck Mining Company; and either alleging that debt to be a fixed amount, or asking for an accounting to have it fixed; and also alleging that it had been paid, or alleging a readiness and willingness to pay it; in other words, an offer to redeem. Were the case before us on such a pleading, we would further claim that a tender should have been alleged. *Hughes v. Davis*, 40 Cal. 117.

But as it is not before us, even on such a pleading as above sketched, *a fortiori* the question as to whether it was a mortgage on the present pleading could not be entertained. In this case nothing has been done except to declare it a mortgage, and that mortgage given to secure a debt due the Peck Mining Company—nothing as to how much the debt was; nothing as to whether it has been paid, or shall be paid, or what shall be done with the property. Here is dealing out equity by piecemeal, contrary to the well-settled rule, that a decree should cover the whole subject-matter, and leave nothing open for future litigation. *Hughes v. Davis*, *supra*.

But we may be told that all this could not be done under the pleadings: no more, then, could a part of it. There is nothing in the pleadings setting forth that there existed a

company or partnership known as the Peck Mining Company; nor that the plaintiff, Cole, was indebted to that company. The court not only found a partnership, but found a debt for which the conveyance in question was given.

If it could admit evidence to show that a debt existed, and find it did exist, without any such allegation being in the pleadings, why could it not have stepped further, and found how much that debt was, and whether it had been paid, or was now due? It was material—absolutely necessary—to find that a debt existed, in order to find that the conveyance was intended to secure that debt. *People v. Irwin*, 14 Cal. 428.

If it could take one step outside of the pleadings to admit evidence, and lay down a finding on a material point, why could it not take another, and find on all the matters that we have before enumerated as properly coming in under a bill of redemption? True, the departure from the issues actually raised would be more glaring; but the principle involved has been none the less violated by what has been done. If this court should support this decree and the findings under the pleadings, then it should remand the cause for further proceeding, that is, to have the debt ascertained—whether it is paid, or due and owing, etc.—following the departure to its logical termination.

And here, naturally, comes in the question of costs. The court erred in adjudging costs against the defendants. Had this been a bill for redemption, reciting the matters we have before set out, the plaintiff might have had an accounting, but the costs would have been his. *Daubenspeck v. Platt*, 22 Cal. 330.

If the plaintiff had pleaded a certain amount due on the mortgage and a tender of that amount, and the defendant on accounting had failed to recover more than from analogous cases, it might be adjudged that he should pay the costs. But on what principle are the costs charged to the appellants? By our statute, costs go to the prevailing party as of course on a judgment in his favor. Who has had in this instance a judgment in his favor?

One, in substance, declares the deed void; and the other, in substance, denies that it is and it has been adjudged a mortgage. In whose favor does that come nearer being a

judgment? We submit, in favor of him who declared the deed not void.

John A. Rush, for the respondent.

Upon the first question of error raised by the record and statement on appeal, there can be, it seems to us, no need of argument to satisfy this court that the court below did not commit error for the reasons:

1. That the appellants' counsel seem to have abandoned it here, as they make no argument to sustain it.

2. That it is a well-settled rule that a defendant can not ask as a matter of right that the plaintiff be nonsuited upon the closing of his case if there is any evidence tending to establish the allegations in the complaint; and in the case at bar, it appears not only from the testimony of Cole, Wells, Crane, and Ellis that the plaintiff had established a *prima facie* case, but the appellants in their "statement on appeal" say that evidence had been introduced prior to their motion for new trial tending to establish plaintiff's case. *Ringgold v. Haven et al.*, 1 Cal. 108; *Masten v. Griffing*, 33 Id. 111; *McKee v. Greene*, 31 Id. 418; *De Ro v. Cordes*, 4 Id. 117; *Cravens v. Dewey*, 13 Id. 40; *Wilkinson v. Scott*, 17 Mass. 249.

3. That defendants waived their motion by introducing evidence in defense of plaintiff's case. *McGregory v. Prescott*, 5 Cush. 67.

As to the allegations of error growing out of the defendants' exception to the action of the court below in overruling their objection to certain questions asked defendant Bean and witnesses Groom and Moreland, they may all be discussed together; for if it was competent under the issue made by the pleadings to ask defendant Bean the question put to him, then, as a matter of course, it was competent to contradict his answer by other testimony by way of impeachment, and we believe that appellants' counsel do not controvert this principle, but claim that the error originated when the question was allowed to be put to Bean.

Now, if in the pleadings in this case the defendants had simply denied each and every material allegation of plaintiff's complaint, and had stopped there, and had in their affirmative testimony simply and only gone into the question

of the condition of Cole when making the deed, there might have been some force in the objection of counsel to the question put to Bean; still, even in that case, we are of the opinion that the seventh allegation in plaintiff's complaint would have justified the question, and the ruling of the court would have still been proper; but when we look at the answer of the defendants, and at the evidence which they had put in opposition to plaintiff's case by this same witness Bean, the action of the court below was so unquestionably right as hardly to need argument to sustain it. Bean had in his examination in chief testified at length, not only as to the making of the deed and the circumstances connected therewith, but had also gone into the consideration of the deed, and testified that the consideration of the deed was certain debts of Cole which Mrs. Bean was to assume and pay as the sole and absolute consideration of the deed. This being the state of the case, what more clearly competent question could be put by way of cross-examination than to ask if he had not, soon after the deed was made, made statements showing or tending to show a different state of facts than what he had just testified to? The testimony in chief having been put in by them, they can not now say that it was irrelevant, and that consequently testimony tending to contradict it was irrelevant and incompetent. We think this enough on this point, especially as appellants' counsel seem to put but little stress upon these assignments of error.

We now come to the main, and we think the only real, question in the case. Does the case as it stands, when submitted to the judge for decision, support the findings and the decree rendered therein?

We will now discuss this proposition as it would stand upon the pleadings alone, and first upon the complaint in and of itself, and insist that, taking the whole complaint together, and giving the true force and effect to the seventh allegation thereof, it authorized to go into the question and to find that this deed was not an absolute one, as such fact is fairly charged in the seventh allegation of the complaint; and if it could find that the deed was not an absolute one, it follows as a necessity, that it could go further and find upon what terms and conditions it was made; and, second, if there is doubt upon the case as made by the complaint, is not that

doubt at once removed when we consider also the answer of the defendants? In their answer they not only failed to sufficiently deny the allegations of the complaint (their denials being in the conjunctive and in the language of the complaint), but they go on and allege affirmatively propositions showing that the deed was given for a valuable consideration, and that full payment had been made therefor, etc. Now, under our statutes and practice, each of these affirmative allegations is considered as controverted and in issue (Comp. Laws, 396, sec. 65); and having so alleged this affirmative matter, it clearly authorized the court to go into the question of the facts relating to the making of the deed and the consideration therefor, and to decree in relation thereto.

But we go still further, and say that even if the pleadings were not sufficient to have sustained the findings and decree, still if the defendants had allowed without objection testimony to be introduced which would do so, then this court will not disturb the decree made. *Marshall v. Ferguson*, 23 Cal. 66; *Campbell v. Jones*, 38 Id. 509 (cited by appellants). And if this is true as to evidence of plaintiff introduced without objection, *a fortiori* must it be true as to evidence put in by defendants themselves; and as in this case the only evidence in the record objected to by defendants was (as already shown) the direct and logical consequence of their own evidence, we must for the purpose of determining the present inquiry consider the entire evidence in the record as there without objection.

The only question yet to be discussed is this, Does the evidence in this case sustain the findings and decree? In this connection, we ask the court to consider the case as presented by the entire record, and especially the consideration and object for which this deed was made, as evidenced by the admissions of defendant Bean, as proved by witnesses Groom, Moreland, Bowers, and others, and it will clearly appear that the evidence before the court amply warranted the entire findings of the court and the decree entered thereon. We further say, that if we can only look to the pleadings unaided by the proofs, then, as we have before shown, the court was still authorized by the seventh allegation of the complaint to find that the deed was not an abso-

lute one. This the counsel for appellants do not seriously deny, but make their great objection to that part of the findings and decree holding said deed to be a mortgage. If we could not look at the evidence at all, there might be some force in this position; and yet, as we have before stated, it would seem that the right to go into the consideration at all would carry the right to go into a full investigation thereof. But assuming that part of the decree to be erroneous, can the appellants take any advantage thereof? We think not, as that part of the decree is favorable to them.

Again, we say that, so far as interpreting the evidence in this case is concerned, it appears from the examination in chief of defendant C. C. Bean that he knew of Cole's habit of getting drunk and squandering his property, and that he, Cole, had been so doing only a short time before he made the deed in question. This being the case, all the facts and circumstances in connection with the transaction will be interpreted most strongly against appellants, and if any advantage was taken of Cole in the transaction, that alone would be sufficient ground for setting aside the deed. 1 Story's Eq. Jur., sec. 237-239.

Further, we submit that the finding of facts by the court would have justified it in holding as a matter of law that the deed was absolutely void; and if this is true, appellants can not complain because one more favorable to them has been entered. 1 Story's Eq. Jur., sec. 237.

To sum up all the propositions in the case, we insist that the pleadings and the evidence in the case without objection amply warranted the finding of fact and law as found by the court below, and that, if any fault can be found with the decree, it is that it is too favorable to the appellants; and it is clear that they can not have a reversal on that account.

But appellants raise an incidental question as to costs, and urge that even if the decree were warranted, they, and not the plaintiff, should have been allowed costs; and if it had not been alleged that plaintiff had sought to have a reconveyance and defendant refused it, alleging absolute ownership, there might be some force in the position. But as it appears from this case that defendant C. C. Bean by his statement and acts made the suit necessary, therefore he should pay costs.

A tender is not necessary in such a case as this, but if it was, a tender is always obviated when the party to whom the tender should be made so acts as to show that a tender would be useless; and that is the situation in this case.

We do not understand appellants to insist that a tender was necessary in order that this action might be sustained, but if they do, the case of *Daubenspeck v. Platt*, 22 Cal. 330, is decisive against them.

Evidence to controvert the answer is just as competent as that to support the complaint. *People v. Irwin*, 14 Cal. 437.

We further maintain that the pleadings and proofs warranted the court in finding that Cole at the time of making the deed was incapacitated by drunkenness from taking care of his own property. That he deeded the property for the purpose of protecting himself from wasting his property while thus incapacitated, and at the restoration of his capacity to take charge of his business. That if the court below erred in finding the deed to be a mortgage and so decreed, this court will correct the judgment, and enter such decree as the court below should have entered.

By the Court, FRENCH, C. J.:

Neither the judgment nor decree in this case can be sustained under the pleadings. The plaintiff by his complaint asks that a certain deed from plaintiff to Mary M. Bean, wife of Curtis C. Bean, be canceled and held for naught, on the grounds that he was incapacitated at the time of its execution, and that the execution of the same was procured by fraud and conspiracy, and asks also an injunction against defendants Bean and his wife pending the action.

The answer does not properly deny some of the allegations of the complaint. But no objection to any of these imperfect denials appears to have been taken by the plaintiff, and evidence was introduced by plaintiff in support of the allegations of the complaint in the same manner and to the same extent as would have been done if all the denials in the answer had been perfect. At the close of plaintiff's testimony, defendant moved for a nonsuit, which the court denied. There was no error in this denial. The motion for nonsuit was frivolous. The testimony first introduced

by plaintiff in support of his complaint was strictly and entirely correspondent to its allegations, and tended strongly to support the same, making a formidable *prima facie* showing in the case. But afterwards the evidence takes another and different line, not included in the issues, or responsive to the allegations of the complaint. There must be substantial correspondence between the allegations and the evidence. But throwing all the evidence, with the objections to the same, out of the record in this case, the incompatibility of the pleadings with the findings and decree still confronts us.

It was not necessary for a reversal that the evidence and the voluminous transcript in this case should have been brought up. If the pleadings, findings, and decree only had been brought here, a reversal must have resulted. Even on the judgment roll alone the error fully appears. The complaint does not support the decree. In the findings and decree, the instrument sought to be set aside by plaintiff's complaint is found to be a mortgage executed to a married woman, the wife of Bean, to secure indebtedness to other persons or parties.

Leaving out of view all questions of the conformity of the pleadings to the case made by the evidence, the pleadings, findings, and decree in this case are not only inconsistent with the issues made by the pleadings, but are also inconsistent with each other; and viewing the findings and decree separately and without any relation of the one to the other, each of them is inconsistent with itself. On page 116 of the transcript, the complaint in the case and also the deed from plaintiff to Mrs. Bean are both made a part of the findings, as follows: "Which said complaint and said exhibit [the deed above mentioned] is made a part of the findings herein and a part hereof." This is entirely inconsistent with the findings of the judge in the case.

It is a part of the duty of attorneys to see that the findings are within the issues, and that the judgment or decree be supported by both the pleadings and the findings. This seems to have been either overlooked or entirely lost sight of for the time being by the learned counsel of respondent in the latter part of the proceeding in the court below. The learned judge of that court seems to have been intent

on doing no injustice to any party, but substantial justice to all. The decree was not drawn in accordance with the findings, although expressly ordered by him at the close of his findings to be so made. The cause has been ably argued on both sides at the bar of this court, especially so on the part of respondent; but on the grounds stated above, the findings must be set aside, and the judgment and decree reversed and cause remanded for a new trial, and it has been so ordered.

The associate justices concurred.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1878.

**WILLIAM COLE v. CURTIS C. BEAN AND MARY
M. BEAN, HIS WIFE.**

RIGHT TO TRIAL BY JURY IN EQUITY CASES.—In cases of purely equitable cognizance it is entirely discretionary with the judge whether or not he will call in the aid of a jury to assist him in determining special issues of fact framed by the parties to the action.

PERSON NOT AN EXPERT MAY TESTIFY AS TO EFFECT OF LIQUOR upon a particular person with whom he is acquainted.

DECLARATIONS OF AGENT, ADMISSIBILITY OF.—Where some evidence of the existence of an agency has been given, it is competent to give in evidence the acts and declarations of the agent respecting the subject-matter of his authority.

APPEAL from the district court of the third judicial district, county of Yavapai. The facts are stated in the opinion.

Thomas Fitch, attorney for the appellant.

Rush and Wells, attorneys for the respondents.

No briefs on file.

By Court, FRENCH, C. J.:

The hearing of the appeal in this cause in the supreme court without the usual copies being furnished was had by agreement of the parties and consent of the court, to save the hearing of the appeal from going over the yearly term. No copy of the transcript has been furnished since the hearing; I am therefore without a transcript of record in this case. On the decision of the case in the district court, I filed an opinion of some length, which by statutory provision, and also by stipulation, has been embodied in the transcript and goes with the record in this case. That is the opinion of a single district judge at *nisi prius*, but after the able, elaborate, and exhaustive arguments of appellants in the supreme court, I have found nothing in that opinion which, in my capacity as one of the justices of the higher court, I wish to change.

The present opinion, under these circumstances, must be somewhat summary. At the commencement of the hearing of this case in the district court, counsel for defendant presented certain special questions, and asked that these questions be submitted to a jury. If the case were one at law instead of equity, it would not be permissible for one party to the action to frame certain specific issues or questions, and ask a jury to determine these against the objection of the other party to the action, and without the sanction of the court.

Such a mode of proceeding would be in derogation of the rights of the opposite party, and a trenching on the powers and functions of this court. But the present is an equity proceeding purely. Our statutory enactments in this regard conform to those of California, whose courts have uniformly denied the right to trial by jury in equity cases. In the United States courts the same rule has been established. Chief Justice Marshall, in *Harding v. Handy*, 6 Curt. 534, says: "An issue, indeed, might have been directed; but we do not think it a case in which this course ought to have been pursued. The degree of weakness, or of imposition, which ought to induce a court of chancery to set aside a conveyance is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. A

verdict affirming the capacity of W. C. to execute these deeds on the ninth day of May, 1805, could not, we think, have been satisfactory to the court, and it was, consequently, not necessary to refer the question of competency to a jury."

It is generally impracticable for the chancellor to know or determine, before at least a partial hearing, whether a jury would be proper or not.

The objection taken to the testimony of Hattie Wells, as to Cole's condition, that is, the degree and intensity of his intoxication on the latter part of October and first of November, and extended to the testimony of many other witnesses on this point, can not, I think, be sustained on reason or authority.

An examination of cases like the present will show that where the question was the mental condition at a certain day, the testimony, both under and without objection, has extended back not a few days only, but for months and years.

It is also objected that testimony of persons not experts was received as to the effect of liquor on Cole. I think this testimony is proper. If the witness, from long-continued and intimate association, knows the facts from his personal intercourse, his testimony is proper. An expert can say what the general effects would be—can testify as to the effect of liquor, drugs, poison, or food, upon persons generally. The expert can say, for example, that the common article of food cheese is a common article of diet, wholesome and agreeable to people in general, but to some persons the most detested and abhorrent, and fatal to health and even life.

The witness who speaks from his own personal knowledge knows to which of these classes the person concerning whom the scrutiny is made belongs. In other words, he knows the effect of that article of food upon the particular individual inquired about much better than the mere expert.

So of drugs and poisons: the witness who speaks from personal knowledge can tell the effects on the particular person more surely than the expert, who lacks these personal observations; the evidence is more direct and positive, and thus more decisive.

Elaborate objections were taken by defendants to the declarations of Mr. Bean, made after the transaction of the deed, and because these declarations as to the transaction were

made after Bean, acting as the agent of his wife, had procured the deed in question. I am entirely clear that the objection that these declarations ought not to be received as evidence, because not made at or about the very time of the execution of the deed (*dum opus fervet*), can not be sustained. Mr. Bean was the agent of his wife before these transactions, and continued to be her agent all the time from the time of the execution of the deed up to the time of the commencement of the suit. When these declarations were made, he was in the very midst of other transactions of and concerning and connected with the subject-matter of the main transaction, viz., the deed between his wife and the plaintiff. If any one thing is more clear than another, it is this, that all this business was entirely conducted and transacted by Mr. Bean, as he testifies, constantly as the agent of his wife. The objection, therefore, that these declarations form no part of the *res gestæ* has no application at all on this point.

The only question necessary to consider here is, Had Mr. Bean, before he made these declarations, ceased to be the agent of Mrs. Bean? Had his authority as her agent in this business ceased? The admissibility of the declarations must be determined solely by the answer to these questions.

The law applicable to this point is well expressed in the case of *Stewartson v. Watts*, 8 Watts, 392; also found in Dunlap's *Paley on Agency*, edition of 1856, p. 250, note. I quote from the note syllabus of the case in Watts: "When some evidence of the existence of an agency has been given, it is competent to give in evidence the acts and declarations of such agent respecting the subject-matter of his authority; and whether his agency had then ceased or was continued must be submitted as a fact to the jury, with the direction that if his authority had ceased, his acts and declarations are to be disregarded."

It is not claimed that Mr. Bean's acts or authority as agent of Mrs. Bean had ceased at or before the time of these declarations. In fact, it affirmatively appears from the record that he continued to act as such agent.

Judgment affirmed.

TWEED, J., concurred.

PORTER, J., expressed no opinion.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1879.

TERRITORY *v.* CHARLES SELDEN.

BILL OF EXCEPTIONS MUST ACCOMPANY THE TRANSCRIPT in all cases of appeal.

APPEAL from the district court of the first judicial district, county of Pima. The opinion states the case.

L. C. Hughes, for the respondent.

S. Ainsa, for the appellant.

By Court, FRENCH, C. J.:

There is no bill of exceptions and no statement whatever in this transcript; nor is there any assignment or claim of error in the case in this court.

An examination of the record discloses no error. The judgment of the court below is therefore affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1880.

D. K. HOUGHTALING, RESPONDENT, v. N. ELLIS
ET AL., APPELLANTS.

REFORMATION OF CONTRACT ON WHICH SUIT IS BROUGHT may be properly asked for in the answer thereto, if the suit is an original proceeding in equity.

TWO SYSTEMS OF LAW AND EQUITY CAN NOT BE BLENDED in the same action or proceeding in the federal constitutional courts. The equity jurisdiction of those courts is derived solely from the constitution of the United States and the acts of congress, and is the same in every state.

COURTS OF TERRITORIES ARE NOT UNITED STATES CONSTITUTIONAL COURTS, but United States territorial courts, acting under the statutes of their respective territories.

EQUITABLE DEFENSE TO ACTION AT LAW CAN BE AUTHORIZED by territorial statutes, and has been so authorized by the statutes of the territory of Arizona.

APPEAL from the district court of the third judicial district, county of Yavapai. The action was an action at law brought by the plaintiff against the defendants, on a written contract for the payment of money. The defendants, in

their answer, set up new matter of an equitable nature as a defense to said action. Plaintiff demurred to the answer, on the ground that the facts therein set up constituted a bill in equity seeking affirmative relief, and could not be pleaded by way of defense to this action. The court below sustained the demurrer and gave judgment for the plaintiff, and the defendants appealed to this court.

Clark Churchill, for the appellants.

Rush and Wells, for the respondents.

By Court, FRENCH, C. J.:

In the argument of this case it was assumed that the question was raised in this record whether in this territory an equitable defense can be interposed to a complaint setting forth an action at law, and especially whether the defendant pleading such equitable defense can properly ask that the contract on which the legal action is founded be reformed in such action. There is no doubt that a reformation of the contract on which the action is brought may be properly asked for in the answer in such action, if the action be an original proceeding in equity. This may be done even in an action for the specific performance of such contract. The matter entitling a party to amendment of his contract may be set up by way of defense to a proceeding for a specific performance of it. *Woodworth v. Cook*, 2 Blatchf. 151.

As to the federal constitutional courts, the rule and practice is well established that the two systems of law and equity can not be blended in the same action or proceeding. The equity jurisdiction of the purely federal courts is derived solely from the constitution and acts of congress. The equitable jurisdiction of these courts is the same in every state, and the rule of decision is precisely the same in all. Their rule of practice is not regulated or even modified by the state practice. *Dodge v. Woolsey*, 18 How. 347; *United States v. Howland & Allen*, 4 Wheat. 108; S. C., 4 Curt. 360. A great many cases to the same effect are found in the United States supreme court decisions, and none *contra*. The supreme court goes further still; in the case of *Jones et al. v. Howard*, 20 How. 22, the court say:

"It must be remembered that this is a suit at law to recover the possession of the land in dispute; and that although it may be the course of practice in the courts of the state of Texas in a suit of this description to blend in the proceeding the principles of law and equity, in the federal courts sitting in the state the two systems must be kept distinct and separate. This principle is fundamental in these courts, and can not be departed from. The court, therefore, in a suit at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity. In a case calling for the interposition of this court, and turning upon equitable considerations, relief should be sought by bill in equity." The doctrine is here clearly announced that if a party seek equitable remedy or relief, he must do it by original bill, and not in answer to an action at law. In the United States federal courts, state statutes and practice have no application.

This doctrine and practice, so uniformly announced and maintained in all the United States federal courts, has no doubt tinged the decisions of the territorial courts in some instances.

But the courts of the territories are not United States constitutional courts, but United States territorial courts acting under the statutes of their respective territories; and the question in the case at bar is whether an equitable defense to an action at law can be authorized by territorial statutes, and if so, whether it has been so authorized by territorial enactments in Arizona.

I am of the opinion that both these questions may be answered in the affirmative. Two cases in the supreme court of Montana are cited by the respondent. But these cases do not reach the case at bar. In the summing up of the doctrine of these two cases, in the latter case, in divisions numbered 1, 2, 3, 4, and 5, on page 540, the concluding number 5 reads as follows: "That suits in equity, where equitable relief is prayed, or *where an equitable defense is set up to a claim at law*, must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor." This is precisely what is prayed for by the defendants in this case.

I am of the opinion that the answer in this case is a full bill in equity in substance, and not justly subject to the objection of not containing facts sufficient to constitute a defense; if doubt be entertained as to the equitable matter solely, it sets up the legal matter, not by denial, it is true, but by averment, and facts stated, such as that the consideration failed, which constitute a good defense at law. I am therefore of the opinion that the judgment should be reversed and the case remanded for further proceedings, and that the demurrer to the answer be overruled, and it is so ordered.

PORTER, J., concurred.

SILENT, J., dissented.

After the rendition of the foregoing opinion, a rehearing was granted, upon which counsel for appellants presented the following points:

1. The answer interposes two defenses to the complaint, viz.: 1. A failure of consideration, which would be a good defense at law; 2. Facts showing that the alleged contract had never been entered into by defendants; but, by the mutual mistake of all parties, the paper set out in the complaint failed to express the contract which was really made, and thus constituting an equitable defense.

2. The answer alleges that "the enforcement of any contract by the plaintiff against the defendants herein, or either of them, such as the said plaintiff in and by his said complaint herein asserts, claims, and avers, is evidenced by the said memorandum or writing in said complaint set out, would be a fraud in fact and in law upon said defendants, and each of them, and would in effect foist upon and compel them to perform a contract which they, or either of them, never entered into, made, or assented to in any manner, and for which they did not, nor did either of them, ever have or receive any consideration whatever." The whole difficulty seems to arise out of a confusion, in the minds of counsel for respondent and the court below, of the contract with the evidence of it; the agreement which was really made and the writing which it is claimed by the plaintiff contains the evidence of the agreement. While the answer

admits the signing of the writing, it denies that the writing correctly states the contract; and by the answer the defendants do not seek a change of the contract, but they ask the court to assert against them the contract which they really made, not one which they did not make.

3. The legislature has by statute provided that "there shall be in this territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs." Comp. Laws, p. 409, sec. 2437. And this statute is in precisely the same words as section 1 of the civil practice act of California and of section 69 of the New York code. The supreme court of California have uniformly held that, under this statute, in the form of the remedy, no distinction exists between legal and equitable rights; although the general principles which govern the case remain unchanged. *Jones v. Steamship Cortes*, 17 Cal. 498; *Lubert v. Chauviteau*, 3 Id. 463; *Wiggins v. McDonald*, 18 Id. 127; *Payne v. Treadwell*, 16 Id. 243; *Cordier v. Schloss*, 12 Id. 147. The effect of this section of our statute is to authorize our courts to grant relief under both legal and equitable principles in the same action. The courts no longer recognize the distinction which formerly existed in a declaration at law and a bill in a suit in equity. The complaining party in each case files his complaint containing a statement of the "facts constituting the cause of action in ordinary and concise language." Comp. Laws, p. 414, sec. 2475. And the court will grant such relief upon such complaint as the plaintiff may be entitled to, without regard to whether the rules of law or principles of equity, or both, are to be invoked. It often happens, in fact, that the courts grant both legal and equitable relief in the same action. To do otherwise would be to utterly disregard the statutes. *More v. Massini*, 32 Cal. 595; *Gates v. Kief*, 7 Id. 125; *Rollins v. Forbes*, 10 Id. 299; *Marius v. Bicknell*, Id. 217; *Truebody v. Jacobson*, 2 Id. 269.

This position being once established, the criticism of the learned counsel for respondents, upon the opinion of the majority of this court, is fully answered. In fact, this criticism is entirely without foundation. An examination of the report of the case referred to, *Woolman v. Garringer*, 1 Mont. 540, will disclose the circumstance that the supreme court

of Montana held that the legislature of that territory, under the organic act thereof, had no power to blend the two jurisdictions in so far as to grant the plaintiff equitable and legal relief in the same proceeding; but notwithstanding this, that court made use of the language quoted by Mr. Chief Justice French in his opinion in this case.

4. But it is contended, in behalf of the respondent, that our statute, while giving this broad scope to the jurisdiction of our courts, and removing the partition walls between their jurisdiction at law and in equity proceedings, has still fettered them by other statutes in such a manner that they must still maintain the old, obsolete fictions, and confine themselves within other limits than those prescribed by the principles of law and equity which are invoked by the facts of the case before them; and section 46 of our practice act is cited in support of this position. This section reads as follows: "The answer of the defendant shall contain: 1. In respect to each allegation of the complaint controverted by the defendant, a specific denial thereof, or a denial thereof according to his information and belief, or any knowledge sufficient to form a belief; 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language."

What is there in this language to change this rule? The answer may contain: 1. A denial; 2. A statement of any matter constituting a defense. In the case at bar, as already shown, the answer contains both these defenses. The law defining "counter-claims" has nothing to do with the subject under consideration. Our statute allows a counter-claim; but it also allows, entirely independent of that, any "new matter constituting a defense," whether it be such matter as comes within the definition of a counter-claim or not.

5. To the point made by respondents' counsel that the plaintiff, upon the trial of the issues tendered by the answer, would have to rely upon a simple denial, I have to say: 1. This is not correct. Section 2501, p. 418, Comp. Laws, provides: "The allegation of new matter in the answer shall be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." Under this statute the plaintiff would be permitted to give

any evidence, either in denial or avoidance of the new matter in the answer. 2. Even though it were true, that would not change the law with reference to defendants' right to plead the new matter. 3. I can not conceive of a case where a court of equity, under such circumstances, would be unable to fully protect a plaintiff from any and all the dire consequences depicted by respondents' counsel.

6. I therefore respectfully submit that the judgment of this court, reversing the judgment of the court below, should not be changed.

And counsel for respondents presented the following points: It seems to us that the new matter set up in and constituting defendants' answer is in no way or in any legal sense a defense to plaintiff's action. It nowhere denies or puts in issue any allegation of plaintiff's complaint, nor does it pretend to confess and avoid; neither is the matter in any way in bar of plaintiff's action. The term "defense" is essentially negative, and not affirmative. Pomeroy, treating of the term "defense," says: "The facts from which the defensive right arises may, perhaps, in a proper occasion, and when employed for that purpose, be made the basis for affirmative relief; but when so employed, they would not be a defense. In short, a defense is not to be conceived of as the means of acquiring positive relief, or any remedy, legal or equitable." Pomeroy's Remedies and Remedial Rights, sec. 88.

To entitle a defendant to plead or set up new matter in his answer, it must constitute a *defense*, or a counter-claim. Now, with this definition of the term "defense" (and we think it accords with the legal definition from time immemorial), we can not see how the matter set up in defendants' answer can be construed to fall within its terms. The answer, instead of being negative in its character, is essentially affirmative in every particular. The gist of the answer is, that certain words by mistake were omitted from the writing, and it asks that the writing be reformed by inserting those words. Suppose the relief sought by defendants were granted. What then? The plaintiff's right of action is founded upon the contract. Would the relief, when granted, be a bar to the plaintiff's action? Certainly not. His right

of action upon the contract would still exist. He still would have the right to have determined by the court or a jury whether anything were due him by the contract, and if so, how much. We submit, then, that it can not be pleaded, and is not, in bar of plaintiff's action.

The next point we present is that the new matter set up in defendants' answer is purely equitable in character; matter of which courts of equity alone have jurisdiction, and with which courts of law can not deal; that the answer consists of new matter, which could not, under the common-law system, have been pleaded as a defense to an action at law. From these propositions no one will dissent. Then the question arises, Have the laws of our territory so changed or modified the system as to authorize the pleading in the action at bar? That the supreme and district courts of this territory are clothed with chancery and common-law jurisdiction by the organic act, and that they can not be deprived of these jurisdictions by territorial legislation, is too clear to be questioned. It will not be disputed that, without legislation, these courts would remain independent the one of the other, and be governed by the well-known distinctions under the common-law system. Admit, for the sake of the argument, that the territorial legislature may prescribe the forms of proceedings in actions at law, and in suits in equity, and may even go so far as to provide that matters belonging separately to each jurisdiction may be tried in the same action; yet, until the legislature does act, the jurisdictions are governed by the rules established by the old system. Then the question as to whether the legislature has so changed the rule as to authorize the blending and trial of matters belonging to the separate jurisdictions in the same action becomes more pertinent. We maintain that it has not. California, New York, and other states and territories have done so, but the legislature of our territory, following in their wake, and copying most copiously from the statutes of California and New York, seems most studiously to have avoided doing so, by omitting provisions of the statutes of those states most clearly intended for that purpose.

We call the court's attention to the second clause of section 46 of our practice act: "A statement of any new matter

constituting a defense, or counter-claim, in ordinary and concise language." Now what did the legislature mean by the defense as used in this clause? Constituting a defense to what? We answer, a defense to the action in which it is pleaded. How shall we determine what shall constitute a defense? The legislature has not defined it. We know of no other way of defining the term than to resort to the common law, to those rules which have been in force from time immemorial until the late departure in the way of civil procedure. Now, by the common law the defenses to an action at law are well defined and established, as well as the defenses to a suit in chancery. The distinction is marked. An equitable defense asking affirmative relief in an action at law is unknown to the old system. In construing this statute, we must, then, have recourse to the common law, and in doing so, it seems to us most clear that the legislature meant and intended by the term "new matter constituting a defense" new matter which constituted a defense to the action in which it was pleaded according to the old system. It may be asked, why insert the clause in reference to new matter, if no change in the nature or character of the defense was intended? We answer that under the general issue, according to the old system, the defendant might give in evidence, by way of defense, many things consisting of new matter; for instance, payment, accord and satisfaction, former recovery, a release, etc., in an action of *assumpsit*; but the statute, by the first clause of section 46, has done away with the general issue. It allows nothing but a specific denial. A specific denial puts in issue nothing but the particular allegation denied; and, according to all rule, evidence not pertinent to the issue is excluded. Van Santvoord, in discussing the general denial allowed by the code of New York, says: "The nature and uses of the general denial under the code have been considerably discussed in some of the more recent cases. It had been supposed at one time to be equivalent to the general issue, and that many of the rules applicable to that plea were also applicable to it. But this view has not been sustained, and it may now be regarded as settled that there is no such thing as the common-law general issue under the code, although it is said that the general denial authorized by the code is, in

some respects, like it. But the points of difference have been very clearly and distinctly stated, and consist mainly in this: *that the general issue* admitted a great variety of defenses *which can not now be introduced under a simple general denial or unless specially pleaded.*" Moak's Van Santvoord, side page 405 et seq.

It seems to us that in this is found an all-sufficient reason for inserting the clause in reference to new matter. Mark the difference between the language used in the statutes of the states, the decisions of which are invoked to sustain the position of defendants, and that of ours. The second clause of the forty-sixth section of the California practice act reads: "A statement of matter in avoidance, a counter-claim constituting a defense, or the subject-matter of cross-complaint *which may entitle a defendant to relief against the plaintiff, alone, or against the plaintiff and a co-defendant.*" Under this statute, the California courts have held that the defendant may set up in his answer, by way of cross-complaint, new matter demanding equitable relief. It seems to us that the California courts may well find the authority to plead this equitable matter, by way of cross-complaint, from the language of that portion of the statute which says the defendant may set up in his answer "*the subject-matter of cross-complaint which may entitle the defendant to relief against the plaintiff.*" There can be no question that the California courts do base their decisions upon this statute, and it is equally clear that that portion of the California statute most clearly sustaining those decisions is omitted from our statute. Hence we argue that the decisions of the California courts upon the subject under discussion ought not to have any considerable weight in construing our statute or in determining whether a purely equitable defense can be interposed in an action at law. By the New York code it is provided as follows: "The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated *legal or equitable, or both.*" Now the New York code contains the exact language contained in the second clause of section 46 of our practice act, but it is immediately followed by that clause just quoted defining the character of the defenses and counter-claim intended. But no such definition

has been given in our statute. By the New York statute, the pleading of equitable defenses to an action at law is expressly given, and upon this express authority the courts of that state have held that equitable defenses could be pleaded to an action at law. By equitable defenses we mean new matter of which courts of equity have had exclusive jurisdiction heretofore. Now we submit that the decisions of the state of New York, founded as they are upon the statutes of that state as above quoted, can have no weight or influence in construing our statute or determining the question involved. Now we maintain that the legislature having done away with the general issue, so well defined and understood, it became necessary, in order to preserve those defenses consisting of new matter, which had heretofore been available under the general issue, to provide some means by which the defendant might interpose them. We submit that a fair judicial construction of the statute can but result in the conclusion that, by the new matter constituting a defense, is meant new matter constituting a defense to the action in which it is pleaded, as defined by the common law. By abolishing the general issue under which defenses consisting of new matter could be made available, without some provision for the preservation of these defenses, they would have been lost. We insist that the second clause of section 46 of our practice act was intended alone for the preservation of these defenses, and that a fair construction of this statute can not extend it beyond their special purpose. The majority of the court, in their opinion heretofore filed in this case, quote from 1 Mont. 540, as follows: "That suits in equity, where equitable relief is prayed, or *where an equitable defense is set up to a claim at law*, must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor." And add: "This is precisely what is prayed for by the defendants in this case." It seems to us that the majority of the court overlook the material fact that the territorial legislature in Montana authorized the pleading of matter belonging exclusively to separate jurisdictions in the same action.

If our legislature had so authorized, then the quotation from the decision in Montana would have been appropriate to the case at bar. We again urge that until our legisla-

ture does so authorize, the rule governing the separate jurisdictions must prevail. It may be argued that it is a *counter-claim*, within the meaning of the statute. Van Santvoord, speaking of the counter-claim of the New York code, which is very similar to that of ours, says: "The exact meaning of the term 'counter-claim,' as used in the code, seems to have baffled judicial ingenuity itself; and some of the judges have not hesitated to acknowledge the fact in no very complimentary terms to the authors of this provision. Judge Barculo thinks it unnecessary to attempt to define the precise meaning of this unfortunate compound which has been pressed by our modern Solons into the service of the fourth, and it is to be hoped the *last*, edition of the code:" See Moak's Van Santvoord, side page 549, note 1. To arrive at anything like a correct definition of this complicated term, we must examine, in connection, the several statutes bearing upon the subject-matter; knowing it to be in derogation of the common-law rules of pleading, we must be careful that our construction does not do violence to long-established rights, if we may avoid it. By our statute the complaint and answer are the only pleadings allowed in forming the issues of fact. The plaintiff is not allowed to reply to new matter set up in the answer. Such new matter is simply considered denied, and on the trial the plaintiff, in his proofs, is confined to that which may be introduced under a simple denial. Now, here are two complete and independent actions, so far as the matter and the manner of pleading are concerned. The one set up in the complaint on the law side of the court, the other set up in the answer on the equity side of the court, each consisting of distinct, independent matter. If the construction of the statute sought by defendants prevails, then to the action at law set up by plaintiff, on the law side of the court, the defendants may plead new matter, of which courts of equity have exclusive jurisdiction; while to the cause of action on the equity side of the court, set up by defendants in their answer, the plaintiff must rely upon a simple denial. It is most palpable, if this construction be given, it will, in many cases, deprive litigants of long-established and well-defined rights. To illustrate: Suppose the defendants, prior to the bringing of this suit by plaintiff, had

brought suit on the equity side of the court for the reformation of the written instrument, alleging the same facts as are set up in the answer in this case; that the case had been tried by a court of competent jurisdiction, and judgment and decree rendered refusing to reform the writing; that afterwards the plaintiff brings this suit upon the writing, and the defendant sets up in his answer the same facts as in his answer in this case. The matter of the reformation of the writing has been once tried. Must it be tried again? If not, how can the plaintiff avail himself of the former judgment and decree? He can not plead it, because he has no right to reply. He can not give it in evidence, because it is not relevant to any issue raised by the pleadings. If the construction sought by defendants' counsel be maintained, we can see no way to avoid a retrial of the matter of reforming the writing in the case supposed; and the plaintiff would be deprived of the benefit of the well-established rule that a matter once tried is forever tried.

We maintain that the term "counter-claim," as used in our statute, was intended to include such matters as could have been formerly pleaded in the particular action, such as set-off, recoupment, and the like. The construction for which we contend will preserve the harmony of our remedial judicial system.

With due deference to the opinion of the court, we insist that the proposition that the answer sets up by any averment a defense at law is erroneous. As the court has said, the matter set up in the answer is a perfect bill in equity, asking for the reformation of the writing set out in the complaint. It is palpable that the pleader had nothing in view but the reformation of the writing. He had no idea when drawing it that it should be used as setting up legal matter which constituted a defense at law, such as the want of consideration. In his prayer he asks for no relief that a court of law could give him, except that he be permitted to go hence with his costs.

The plaintiff in his complaint sets out the writing. The writing declares: "The consideration of this instrument is the execution of the agreement of November 8th of said Houghtaling." This declaration is an averment of the complaint as to the consideration. The defendants in their an-

swer do not deny this averment of consideration. The language of the answer is certainly addressed to a court of equity, and not to a court of law. It seems to us that the court will not hold that the answer contains both a legal and an equitable defense, unless the matter taken as a whole be such as may be pleaded as well to an action at law as to a suit in equity.

The court reaffirmed its former opinion.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1881.

NERI F. OSBORN, APPELLANT, v. E. P. CLARK, TERRITORIAL AUDITOR OF ARIZONA, RESPONDENT.

MANDAMUS LIES TO COMPEL AN INFERIOR COURT, BOARD, OR OFFICER to perform a duty enjoined by law, but unless the act to be done is purely ministerial, it can not command how it shall be done. If the act, whose performance it is sought to compel, is judicial or discretionary in its character, no court has power by its writ of mandate to command in what manner the act shall be performed. .

MANDAMUS WILL NOT LIE TO COMPEL AN OFFICER to act on a matter upon which he has already acted, however erroneous his action may have been. The writ of mandate is in no case a process for the review or correction of errors.

NO OFFICER OF TERRITORIAL LEGISLATURE CAN BE ALLOWED ANY COMPENSATION for his services beyond that which is provided by the laws of the United States.

APPEAL from the district court of the second judicial district, county of Maricopa. The facts are stated in the opinion.

John Haynes, Baker, Alsap, Lemon, and McCabe, for the appellant.

Fitch and Churchill, for the respondent.

By Court, FRENCH, C. J.:

This is an application for a writ of *mandamus* commanding and enjoining the said auditor to draw his warrant on the territorial treasurer for the sum of one hundred and eighty dollars, under an act of the legislature of Arizona. No facts are stated in applicant's petition, but an affidavit of the applicant is annexed to the petition, from which it appears that petitioner was an officer of the legislative council of the session of 1881, as assistant clerk of said council, and that his claim is for compensation for services in that capacity. It further appears from the affidavit that the auditor has acted on the claim of applicant, which was five hundred and forty dollars, auditing and allowing thereon the sum of three hundred and sixty dollars, and has issued a warrant for the sum allowed, which has been accepted by petitioner.

This action of the auditor is fatal to petitioner's application for *mandamus*. If the auditor has erred in auditing petitioner's claim, such error can not be reviewed by *mandamus*. If it could be reached by writ at all, it must be by *certiorari*, not *mandamus*.

The writ of mandate lies to compel an inferior court, board, tribunal, or officer to act, but never to command how to act, unless the act be purely ministerial. If the act sought for be judicial or discretionary in its character, no court by its writ of mandate can command what this action shall be, much less can it command how and what the said action shall be after he or it has already fully acted upon the matter, no matter how erroneously. The writ of mandate is in no case a process for the review or correction of errors. But it is clear that the auditor committed no error as against petitioner. The error of the auditor, if any, was in favor of petitioner, as fully appears by the direct, positive, and express provisions of section 1855 of the United States statutes, as follows: "Section 1855. No law of any territorial legislature shall be made or enforced by which

the governor or secretary of a territory or the members or officers of any territorial legislature are paid any compensation other than that provided by the laws of the United States." Wherefore, it has been ordered that petitioner's application for a writ of *mandamus* be denied and his application be dismissed.

STILWELL, J., concurred.

PORTER, J., dissented.

TERRITORY OF ARIZONA, RESPONDENT, v. THOMAS HARPER, APPELLANT.

CHARACTER OF DECEASED IS NOT IN ISSUE IN TRIAL FOR MURDER, unless some evidence has been given tending to show that the defendant acted in self-defense.

WHERE JURY IN CRIMINAL CASE RETURN VERDICT IN WRITING, which is read to them by the clerk and declared by them to be their verdict, it is not necessary that such verdict should be recorded in the minute book of the court before it is so read to the jury.

APPEAL from the district court of the first judicial district, Pima county. The facts are stated in the opinion.

James W. Otis and *Ben Goodrich*, for the appellant.

Farley & Pomroy, for the respondent.

Evidence of the character of the deceased can not be given unless at least the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. *People v. Murray*, 10 Cal. 309. The motion for discharge and arrest of judgment, on the ground that there was no complete verdict, was properly denied. *People v. Gilbert*, 57 Id. 96. The court did not err in refusing to amend and change the minutes of the court, and to show that the verdict was incomplete, and not recorded. Id. The court did not err in refusing to admit the testimony of the clerk of the court, and the affidavits of counsel as to the foregoing points. Id. If there is a rule of the court requiring instructions to be handed to the judge by a cer-

tain time in the progress of the trial, it is not error to refuse to give instructions not handed to the judge in time. *Waldie v. Doll*, 29 Id. 555; Rule 51, p. 9, rules of district court first judicial district.

By Court, FRENCH, C. J.:

The transcript in this case fails to comply with the requirements of the rules of this court, and especially with rules 5 and 6. Six errors are assigned. The first two assignments are the exclusion of evidence as to the character of the deceased. Unless it be shown that under the circumstances the defendant might have acted in self defense, or unless the circumstances raise at least a doubt whether he might have so acted or not, the character of the deceased is not in issue. *People v. Murray*, 10 Cal. 309. The third and fourth assignments are untenable. The jury in this case presented their verdict regularly in all respects, and were required by the court to declare the same, which they did. It was a written verdict signed by the foreman. They were then directed by the court to deliver the same to the clerk for record. The clerk received the verdict and filed it, but without entering it in the minute book of the court read it to the jury and asked them if it was their verdict, to which they replied in the affirmative, being the second declaration by the jury affirming their written verdict. The verdict was then perfect and complete. *People v. Gilbert*, 57 Cal. 96. The statutory direction as to recording had its origin in the practice of verbal verdicts. For the same reason as stated in *People v. Gilbert*, there was no error in refusing the motion for arrest of judgment, or in refusing the motion to change or amend the minutes of the court, or in refusing to admit the testimony of the clerk or affidavits of counsel on these points. The rules of the court requiring instructions asked to be presented before the argument, the refusal to give such instructions when not so presented or not presented till after the close of the arguments, can not be assigned as errors. *Waldie v. Doll*, 29 Cal. 555. In this court this case was submitted without argument, and the record discloses no error whatever; the judgment must be affirmed, and it has been so ordered.

STILWELL and PORTER, JJ., concurred.

**WILLIAM ZECKENDORF AND Z. STAAB, RESPONDENTS,
v. L. ZECKENDORF AND ALBERT STEINFELD,
APPELLANTS.**

APPEALS FROM JUSTICE'S COURT TO DISTRICT COURT MUST BE PERFECTED within thirty days from the rendition of the judgment. The provisions of the statute providing for such appeals are mandatory.

APPEAL from the district court of the first judicial district, county of Pima. The facts are stated in the opinion.

Morgan & Price, for the appellants.

1. The certificate of the justice of the peace, upon which the order for dismissal was based, was made after the papers had been filed in the district court. Trans., pp. 3, 4. If so, then its jurisdiction had attached and it was not in the power of the justice, upon a matter purely personal (the payment of his costs), to oust it. *Bray v. Redman*, 6 Cal. 287.

2. After filing the papers in the district court there was no longer any appeal pending, and therefore no order could be made dismissing it. The order operated as a dismissal of the action then pending in the district court.

The statute provides that the appeal shall be perfected and the papers filed in the district court within thirty days after the rendition of the judgment in the justice's court; and if the appeal is not perfected and the papers are not filed in the district court within such time, then, upon production of a certificate, it shall be dismissed.

From this it is clear that a dismissal can only be had in the district court upon the non-perfection of the appeal and the failure to file the papers within the required time. The papers, when once filed, take away the power to dismiss.

3. The transcript made by the justice on appeal to the district court shows that on the twenty-fourth day of March, 1881, the papers and transcript of proceedings were ordered to be transmitted to the district court of the first judicial district. Trans., p. 12.

On that day the appeal was perfected, with the exception that the appeal costs were not paid. Trans., p. 3. The reason why this was not done is explained in the affidavit of *Morgan*. Trans., p. 6.

We further insist that the justice, having voluntarily transmitted the papers, waived his right to his fees so far as the same affected in any way appellants' right. He might have retained them for failure to pay the costs, and this was his only right of control. *Bray v. Redman*, 6 Cal. 287.

It would be, to say the least, a strange doctrine to hold that a justice of the peace had the power to control a case pending in the district court.

4. An appeal can only be dismissed upon a certificate from the justice showing default on the part of appellant as to some step necessary to be taken by him, and not neglect of the justice in the performance of a duty imposed upon him by law. Acts of Tenth Leg., p. 63, sec. 1.

Farley & Pomroy, for the respondents.

1. The appeal should be dismissed.

(a) What purports to be the transcript on appeal does not contain the grounds upon which the appellant intends to rely upon the appeal. *Proceedings in Civil Cases*, Comp. Laws, sec. 340, p. 461; *Hutton v. Reed*, 25 Cal. 478; *Fowler v. Harbin*, 23 Id. 630; *Hoadly v. Crow*, 22 Id. 265; *Bostwick v. McCorkle*, Id. 669; *Burnett v. Pacheco*, 27 Id. 408.

(b) What constitutes the judgment roll? *Proceedings in Civil Cases*, Comp. Laws, sec. 205, pp. 439, 440.

(c) The insertion of other parts of the record in the judgment roll does not make them a part of it. *Sharp v. Daugney*, 33 Cal. 505; *Schenectady and Park Road Co. v. Thatcher*, 6 How. Pr. 227; *Cook v. Dickerson*, 1 Duer, 686.

(d) Only such errors as appear in the judgment roll will be noticed by the court in the absence of a statement on appeal. *Sharp v. Daugney*, 33 Cal. 505; *Harper v. Minor*, 27 Id. 107; *Hutton v. Reed et al.*, 25 Id. 478.

2. Appeal from the district court in cases appealed there from justices' courts is prohibited. Session Laws of 1879, sec. 1, p. 63.

(a) There is no provision of law for impeaching the certificate of the justice provided for in section 1 of the act entitled "An act to regulate appeals from justices' courts," approved February 14, 1879.

(b) If said certificate could be impeached, the affidavits set forth do not, as a matter of fact, accomplish that end.

(c) The court below decided in favor of the certificate, and the presumption is in favor of that decision.

By Court, FRENCH, C. J. :

This is an appeal from the order of the district court dismissing the appeal to that court from the justice's court, and also from the order of the district court denying defendants' motion to set aside said order of dismissal. It appears from the first page of transcript and folio 3 that the judgment was rendered in the justice's court on the fifteenth day of March, A. D. 1880; that an appeal was perfected, except payment of costs, on March 24, 1880, and that on that day the papers were ordered to be transmitted to the district court on the payment of the appeal costs of four dollars (folio 34); that the papers were not transmitted to the district court or there filed until May 8th; and that the appeal costs then remained unpaid. Section 1 of act to regulate appeals from justices' courts reads as follows: "Any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court held at the county in which such justice's court is situated. Such appeal shall be perfected and the papers filed in the district court within thirty days after the rendition of the judgment in the justice's court; and if the appeal is not perfected and the papers are not filed in the district court within such time, the district court shall, on the production of a certificate from the justice to the effect that an appeal has been taken but not perfected, or that the papers have not been ordered up, or the proper costs not paid, or any other necessary step not taken, dismiss the appeal at the costs of the appellant; in which case a certificate of dismissal shall be transmitted under the seal of the district court to the justice's court, with a statement of the costs in the district court; and no other or further appeal shall be taken." Appeal is the creature of statute; without statutory authority there is no appeal or right of appeal. A party, therefore, invoking the statute must conform to its provisions, or lose his right of appeal. But this act, section 42, affirmatively provides that appeals from justices' courts shall be taken

and determined only in the manner herein provided. It appears from the record, and also from the justice's certificate, that the papers in this cause were not filed in the district court until May 8th, more than fifty days from the time of the rendition of the judgment, March 15th, and that the appeal costs had not been paid. Under either of these circumstances, failure to pay the appeal costs, or to file the papers in the district court within thirty days after judgment in justice's court, the peremptory provision, section 1, above recited, is, that the district court shall dismiss the appeal. Courts can not disregard the direct and positive provisions of the statute. The appeal is utterly without merit, and the orders appealed from have therefore been affirmed, with damages.

PORTER and STILWELL, JJ., concurred.

E. FIELD ET AL., RESPONDENTS, v. M. GREY ET AL.,
APPELLANTS.

PARTY IN POSSESSION OF MINING CLAIM MAY HOLD SURFACE OF SAME while he is continuously and industriously seeking a vein or lode believed to exist therein, as against all parties having no better right thereto, and may eject them therefrom if they intrude upon his possession.

APPEAL from the district court of the first judicial district, county of Cochise. The mining ground in controversy is situated at Tombstone. After its location various parties entered on its limits and erected various improvements on it. This action was brought to eject these parties from the claim. The other facts are stated in the opinion.

Morgan & Price, for the appellants.

Stanford, Earl, and Smith, for the respondents.

By Court, FRENCH, C. J. :

This action is ejectment to recover possession of certain mining ground. The complaint is in the usual form for ejectment. The denials of the averments of the complaint contained in defendants' answer, except the denial as to damages, are defective.

But plaintiffs having proceeded to trial on the answer without objection in these respects, we shall consider the answer as a denial of the plaintiffs' allegations.

But the defendants show no right, and do not even claim any right, to the premises in controversy, or to the possession of the same, in their answer, but simply traverse plaintiffs' right to the same.

The plaintiffs had judgment, and defendants moved for a new trial, which was denied, and the appeal is from the judgment and from the order denying a new trial.

The statutory provision as to new trials in this territory provides: "When the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no specifications be made, the statement shall be disregarded." Stat: of 1879, p. 71.

Plaintiffs object to the assignments under the statute. But their objection can not be justly sustained to all the assignments of error. Besides, plaintiffs have expressly agreed to the correctness of the statement on motion for new trial. The statement therefore can not be entirely disregarded under the provision of the statute: "If no specifications be made, the statement shall be disregarded."

The premises were located by plaintiffs' grantors as a mining claim, on the nineteenth day of December, 1878. At that time the premises were entirely vacant, open, unclaimed public land, without any adverse claim, occupancy, possession, or right whatever adverse to plaintiffs' grantors, and so continued till after said grantors, on the first day of July, 1879, conveyed the same by deed to plaintiffs herein, who then *entered under said deed*.

The evidence is clear, complete, and entirely unquestioned on the foregoing points. There is clear prior possession decisively established if the location by plaintiffs' grantors had any validity.

The act of May 10, 1872, revised statutes of the United

States, section 2320, among other provisions contains the following: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

This broad and sweeping provision is earnestly invoked by the appellants in this case as fatal to plaintiffs' claim in this action on the statement and record therein.

It would be sufficient answer to this to say that, for the purpose of this appeal, there is a substantial conflict of testimony on this point—testimony of Field and others on croppings, etc.

Another and more decisive answer to defendants' position is that defendants are not in a position to invoke this provision of the statute against the plaintiffs in this action, for the reason that defendants claim no right to the premises whatever.

But as the above provision of the statute is so decisive in its terms, a brief and summary discussion of the same may not be out of place here, though not demanded in the decision of the present case.

It is well known that in many portions of the mineral regions of the United States blind veins or lodes exist, that is, veins or lodes entirely below the surface of the ground, and often a great distance below the surface, and that in many instances these blind veins or lodes are the only kind found. Where such a state of things exists, the miner must seek the vein or ledge without attempting a location of claim till the vein or ledge is discovered, or he must attempt a location of the surface at least before such discovery; and this brings us to the consideration of the question, What right, if any, does the miner acquire as to the surface, not ledge, by such location, before the discovery of the vein or ledge?

If this exact question has been authoritatively passed upon or settled by judicial decision, my attention has not been called to such decision by counsel or otherwise, except as mentioned and discussed in this opinion.

The doctrine of prior possession or actual occupancy, without legal claim (except so far as such possession *per se* confers it), has been of late fully recognized by the supreme court of the United States as to public lands not mineral.

The question whether public lands, inclosed and occupied by parties not claiming them under the laws of the United States, are subject to pre-emption or homestead entry under such laws of the United States, has been settled in the negative. In the case of *Atherton v. Fowler*, 96 U. S. 513; and later in the cases of *Hosmer v. Wallace*, 97 Id. 575, and *Trenouth v. San Francisco*, 100 Id. 251, the supreme court of the United States held that no pre-emption right can be established by a settlement and improvements on a tract of public land which was already in the possession of another.

The state and territorial courts have necessarily followed these decisions. Those of California in the cases of *Hosmer v. Duggan*, 56 Cal. 257; *Davis v. Scott*, Id. 165; and in the still later case of *McBrown v. Morris*, 59 Id. 64.

In the case of *The Northern R. R. Co. v. Gould*, 21 Cal. 254, the same court sustained naked prior occupancy against a congressional grant of right of way, as to claim of damages. This is the settled doctrine as to public lands not mineral, and by analogy should be recognized where applicable to rights upon the mineral lands. A person making a location of a mining claim fully in accordance with law and usage acquires a right of possession to the same equivalent to an actual or *possessio pedis* possession.

But what right does he acquire by making such location before the discovery of the vein or ledge? Mr. Justice Miller in his circuit has encountered this question more or less directly, and especially in the state of Colorado, where these blind ledges are understood to be of frequent occurrence. But his conclusions have not reached us in an authoritative form.

In the case of *Crossman et al. v. Penderry et al.*, 2 McCrary, 139, the Orion had been first located; the Penderry was located subsequently, on the same ground, and discovered mineral in place before the prior locators had made such discovery.

In this case, which was heard in the circuit court of the district of Colorado, the defendants had judgment in their favor, Mr. Justice Miller, of the supreme court of the United States, in his, the eighth, circuit, rendered the decision, in which he is reported as saying: "This cause is submitted on an agreed state of facts, to the effect that the

ground in controversy is covered by the surface lines of the Orion claim, located by the plaintiff, and also of the Penderry claim, located by defendant; that both locations are regular as to form; that the Orion was first located and surveyed; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place. That the discoverers of the Penderry, located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work, and discovered mineral in place before the discoverers of the Orion. The question submitted to the court is this: Can prospectors on public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? If so, can the plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the court that, inasmuch as the plaintiffs allowed the defendants to enter upon their claim, and within their boundaries, and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceedings prior to the discovery of mineral by the defendants or either party. A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral."

The instructions to juries on this statute in the local federal courts have been various—generally giving the substance of the statute that no location could be made prior to the discovery of the vein or lode therein.

In the case of *Lollards and Highland Chief Con. Min. Co. v. Seth Evans*, October term, 1880, Mr. Justice Hallet, in the same district of Colorado, is reported as instructing the jury as follows: "On the public domain of the United States a miner may *hold the place in which he may be working* against all others having no better right. But when he asserts title to a full claim of one thousand five hundred feet in length and three hundred feet in width, he must prove a lode extending throughout the claim."

This is indefinite as to extent of ground, and in conflict

with the doctrines of the decision above quoted. If a party on the public lands not mineral can by bow and spear hold his possession to a tract of such land, however large, against a party seeking to enter under the pre-emption or homestead laws of the United States, shall not the miner hold the comparatively small tract embraced in his mining claim while continuously and industriously seeking the vein or lode believed to exist therein? I speak of the surface only—not the vein or lode.

I am of the opinion that he can so hold the surface of the claim against all parties having no better right, and eject them therefrom if any so intrude, and such I understand to be the doctrine of Mr. Justice Miller's decision above quoted.

Judgment affirmed.

PORTER and STILWELL, JJ., concurred.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1883.

IN THE MATTER OF THE ESTATE OF THOMAS RODDICK,
DECEASED.

NO APPEAL LIES FROM PROBATE COURT DIRECTLY TO SUPREME COURT.
All appeals from the probate court must be taken to the district court.

APPEAL from an order of the probate court of the county of Pima, denying the petition of Guadalupe Roddick for family allowance.

Ben Morgan, for the appellant.

Farley & Pomroy, for the respondent.

1. No appeal lies from an order of the probate court directly to this court. An appeal is the creature of the statute. *Appeal of S. O. Houghton*, 42 Cal. 35. An appeal is a process of civil-law origin, and a writ of error is of common-law origin. 3 Estee's Pl. 626, and cases cited. This is not claimed nor can it be construed to be brought before this court on writ of error, as no writ of error appears

bringing it here; besides, no writ of error lies where the statute has granted an appeal. *Haight v. Gay*, 8 Cal. 297. In cases similar to the present the statute grants an appeal from the probate court to the district court. Comp. Laws, p. 304, sec. 294. The supreme court has jurisdiction to review on appeal the judgment of the district court in a case brought into that court from another court. *Id.*, p. 395, sec. 3. In all cases the appeal reviews the judgment of the district court only.

2. But granting that an appeal lies in this case, there are no grounds of error assigned in the statement or transcript on appeal; therefore the party has no right to be heard on any. Because, even though error may be found to have been committed in the court below, upon an examination of the transcript, yet if not set forth as grounds of reliance, it is to be deemed released and waived. Comp. Laws, p. 461, sec. 340; *Barstow v. Newman*, 34 Cal. 90; *Walls v. Preston*, 25 Id. 59; *Millard v. Hathaway*, 27 Id. 119; *Crouther v. Rowlandson*, Id. 376.

3. Supposing the exceptions taken to the rulings of the court below to be the errors assigned and relied upon on this appeal, these rulings were not error. All the objections and rulings were to the same effect. Appellant sought below to give evidence concerning transactions or communications had personally with deceased, as against the heirs of said deceased, to which objection was made and sustained. The ruling was correct under the statute. Comp. Laws, p. 472, sec. 420.

By Court, FRENCH, C. J.:

The appeal in this case is from an order of the probate court of the county of Pima, wherein the claim of Guadalupe Roddick for family allowance was denied.

The appeal should have been to the district court of the first district. No appeal lies from a probate court to the supreme court. All appeals from the probate court must be to the district court. The action of the district court on such appeal may be reviewed here. Appeal is the creation of the statute, and the whole matter of appeals is expressly provided for in the statutes of the territory.

Appeal dismissed.

PORTER and SILENT, JJ., concurred.

M. W. BREMEN, RESPONDENT, v. J. H. FOREMAN ET AL., APPELLANTS.

MECHANIC'S LIEN, WHAT SUBJECT TO SALE ON FORECLOSURE OF.—In a suit to foreclose a mechanic's lien, only the interest of the party who caused the building to be erected or the materials to be furnished can be ordered sold for the extinguishment of the lien.

APPEAL from the district court of the second judicial district, county of Gila. The opinion states the facts.

A. C. Baker and Lemon & McCabe, for the appellants.

The action is to enforce a mechanic's lien. The defendants Foreman, Healey, Blockman, and Marshall made default. The defendant Collingwood disclaimed all interest in the suit. The defendant Webster alone appeals to this court.

The material, lumber, shingles, etc., were furnished to Foreman and one Jackson, who were at the time temporarily in possession of the land under an agreement for a deed thereto from J. Collingwood & Co., the absolute owners of the same. Trans., pp. 32, 33.

There is no evidence that J. Collingwood & Co. were ever apprised of the act of plaintiff in furnishing the material.

Foreman and Jackson failed to comply with the terms of the agreement for a deed, never became the owners of the land, and went out of possession of the property. Trans., pp. 43, 44.

Webster became the owner of the premises under a deed from Collingwood & Co. and assignment of a contract. Trans., pp. 40, 41, 46.

The cause being tried before the court without a jury, a decree was entered ordering the sale of "the mill site, formerly known as the Duryea Mill and Water Site, and now known as the Foreman Mill Site, * * * containing four acres, * * * and the quartz mill and machinery connected therewith and on said mill site." Trans., pp. 14-17.

An order was also entered adjudging that plaintiff had a lien upon the same property. Trans., pp. 8, 9.

Motion for new trial denied, and the defendant Webster

appeals from the judgment, the order refusing a new trial, and the order establishing the lien.

1. The mechanics' lien law is in derogation of the common law, and must be strictly construed. *Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Id. 240.

2. The decree orders the sale of four acres of Webster's land, machinery, etc. The lien is established against the same property. This is clearly an error.

The act evidently contemplates the acquisition of a lien upon the interest of the employer or contractor only, be it fee simple or less. The complaint in this action goes to no greater extent. It seeks to charge the interest of Foreman with the lien, and there ends. The allegation that Webster has or claims some interest in the property is nothing more than an averment that he is interested in the supposed title of Foreman. It is not an allegation of a superior title in Webster. His title is not a proper subject of litigation in the action under the pleadings. In one sense, Webster was not even a proper party defendant.

The contract was made with Foreman and Jackson; the material furnished to them. These parties were only in possession of the premises under an agreement for a sale from Collingwood & Co., who held the legal title. It is not claimed that Collingwood & Co. had any notice of the transaction. The complaint in no manner puts their (Collingwood & Co.'s) title in issue. Webster is their successor in interest.

The very object of the action is to enforce a lien against the interest of Foreman and Jackson. The statute goes no further—the complaint embraces no more. These parties acquired no interest whatever in the premises. Webster is entirely unconnected with them in interest. His title is wholly separate and superior.

We are at a loss to understand how a decree could be entered for the sale of his property. Why not enter a money judgment against Webster upon the same principle? Comp. Laws, sec. 4, p. 248; *San Francisco v. Lawton*, 18 Cal. 465; *Worden v. Hammond*, 37 Id. 61.

3. The findings of facts are unsupported by the evidence in the following particulars: 1. Wherever the findings associate Blockman, Healey, and Marshall with Foreman and

Jackson in interest or in purchasing the material. This error is found in the first and sixth findings. 2. The evidence is very pointed that the check was received in payment of the lien. It was received by plaintiff's agent and never returned. Testimony of Eaton, Trans., p. 20, 21. The plaintiff stated in substance that he had accepted the check in satisfaction of the lien. Testimony of Webster, Trans., p. 22, folio 86. The eighth finding is directly in opposition to this evidence. 3. The sixth finding in this respect is totally unsustained, to wit: it declares that the repairs and improvements made upon the premises by Foreman were contemplated by the agreement between Collingwood & Co. and Foreman. The record discloses no such evidence. 4. What testimony is there that plaintiff expended five dollars, or any sum of money, in and about the verification and filing of the lien? Positively none. The ninth finding says he did. 5. There is no testimony in the record that the Foreman Mill Company were the reputed owners of the property. Who constituted the company? The tenth finding is unsupported. 6. The eleventh finding is an important one. Section 4 of the act providing for liens of mechanics, Comp. Laws, 248, declares that "a convenient space around the * * * or so much as may be required for the convenient use and occupation of the premises, shall be subject to the lien." In mining ground, what amount of the land shall be made subject to the lien is an important inquiry. In the case at bar, was four acres necessary to the convenient use and occupation of the mill? or would one acre or even less have answered all necessary purposes? There is no evidence whatever in the record by which the amount necessary can be measured. The finding is without any support whatever in this particular.

4. The prayer of the complaint is for a money judgment for one thousand four hundred and ninety-four dollars and eighty-eight cents, with interest from the twenty-eighth day of February, 1880. The decree was entered May 10, 1882, for one thousand four hundred and ninety-seven dollars and eighty-eight cents principal, and three hundred and thirty-five dollars and ninety-five cents interest.

The Foreman Mill Company, against whom the money judgment runs, made default. Both principal and interest

are excessive. Comp. Laws, c. 65, p. 574; *Parrott v. Den*, 34 Cal. 79; *Raun v. Reynolds*, 11 Id. 14; *Gage v. Rogers*, 20 Id. 91; *Lamping & Co. v. Hyatt*, 27 Id. 99.

5. Appellant insists that the judgment is not supported by the pleadings. We repeat that the leading issue in the case—the object of the action, its pith and core—is to enforce a lien against the interests of Foreman and Jackson, or the Foreman Mill Company. This is the full scope of the complaint. There is no averment affecting the title or interest of Webster, no allegation under which proof could be received or which can serve as a support for a judgment for the sale of his property. We have already argued that the averment in the complaint that Webster has or claims some interest in the property is to be construed as a mere statement that he is interested in the supposed title of Foreman, and not that of a title superior to Foreman's.

If plaintiff furnished material to one who was neither interested in the land nor the owner, it is his mistake; if he desired to connect the owner, the superior title, with the transaction, then an allegation to that effect, with an averment of notice, etc., would have been in order.

A judgment not supported by the pleadings is fatally defective. *Backman v. Sepulveda*, 39 Cal. 688.

William Graves, for the respondent.

This action to foreclose a materialman's lien was commenced November 18, 1880. The facts as set out in the complaint and disclosed by the testimony are as follows:

On the eleventh day of October, 1879, Joseph Collingwood & Co. owned the property described in the complaint, consisting of a mill site and quartz mill thereon. On that day said Collingwood & Co. entered into a written agreement with the defendant J. H. Foreman for the sale of said property to Foreman upon certain considerations expressed in said agreement (*vide* Exhibit C, p. 32). Under that agreement Foreman immediately went into and took possession, subsequently (*vide* Exhibit D, p. 34) associating with him Jesse Healey, A. Blockman, and Seth Marshall—they were all interested in the property and were in possession when the materials were furnished (*vide* Trans., folio 74 et seq.) The agreement mentioned (Exhibit C)

contemplated the expenditure of seven thousand dollars "in the purchase of the necessary machinery and in making the necessary improvements to successfully operate and run said quartz mill." The material was supplied from the twenty-eighth day of November, 1879, to and including the fourteenth of February, 1880 (*vide* Exhibit A, p. 27), and the construction and repairing of the mill were completed on the twenty-eighth day of February, 1880. Plaintiff filed his lien May 24, 1880. The defendant L. J. Webster is the only appellant. The defendants Foreman, Blockman, Healey, and Marshall made default, and Collingwood disclaimed all interest in the controversy. Defendant Webster bases his title on a deed from Collingwood & Co. (*vide* Exhibit 1, p. 41).

Plaintiff recovered judgment, his lien was established and final judgment given May 10, 1882. Motion for new trial made and denied. This appeal is from the judgment, and also from the order overruling the motion.

1. At and during the time the materials were furnished, the property belonged to J. H. Foreman, and those associated with him.

The agreement between Collingwood & Co. and J. H. Foreman, of October 11, 1879, had the effect of altering the relation of the parties toward the property, making Collingwood & Co. the holders simply of the legal title in trust for Foreman, and the latter became the real and beneficial owner of the property. Foreman and his associates being in possession and clothed with the beneficial ownership of the premises, lacking, it is true, the confirmation of the legal title, could charge the property with liens, and in fact subject it to all the incidents and burdens of a legal estate. The fact that Foreman forfeited all rights to the property under the agreement can not divest the lien of plaintiff acquired while Foreman was the owner of the property. Comp. Laws, c. 27, sec. 2; 1 Pomeroy's Eq. Jur., sec. 368, and cases cited.

2. The agreement of October 11, 1879, contemplated the expenditure of seven thousand dollars in the purchase of material for the construction and repairing of the mill.

The agreement between J. Collingwood & Co. and J. H. Foreman, independent of and throwing out of view alto-

gether its effect as to the ownership of the property, required Foreman to expend seven thousand dollars "in the purchase of the necessary machinery and in making the necessary improvements to successfully operate and run said quartz mill." It was in compliance with this part of the agreement that Foreman and his associates incurred the indebtedness for materials, the lien for which is now sought to be enforced. Webster had notice of the lien and also of this agreement. (*Vide Exhibit 2.*) The interest of Col-lingwood & Co. in the property was incumbered by the lien for the reason that they required Foreman to purchase the material for which the lien fastened. *Moore v. Jackson*, 49 Cal. 109.

3. The lien law is to be liberally construed, so as to give lien claimants the benefits intended. *Davis v. Alvord*, 94 U. S. 545; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219.

Since writing the foregoing we have received appellant's brief, and we shall briefly answer the points which we deem to require an answer.

1. It was not error to order the sale of the "mill site * * * containing four acres, and the quartz mill and machinery connected therewith and on said mill site." Plaintiff alleged that "four acres of land in a square body, of which the said mill building or structure is the center, is required for the convenient use and occupation of said building." Trans., p. 3. This is not denied. Plaintiff also alleged that he paid for verifying the lien the sum of five dollars. Trans., p. 4. This allegation was not denied. It is an elementary rule that no proof is required of facts admitted or not denied. Comp. Laws, sec. 2501; *Landers v. Bolton*, 26 Cal. 416.

2. Counsel insists with a good deal of persistence that plaintiff's lien was satisfied by payment—the payment consisting in the reception of a worthless draft drawn by Seth Marshall on Jesse Healey and A. Blockman. The evidence shows that the draft was not accepted in satisfaction of the lien. Testimony of Eaton, Trans., p. 23; Testimony of Webster, Trans., p. 22.

Granting that the evidence is conflicting on this point, then we invoke the well-established rule that findings will not be disturbed when there is a substantial conflict in the evidence.

By Court, PINNEY, J.:

This is an action for the enforcing of a mechanic's lien for material furnished.

Section 4 of the lien law provides: "The land upon which any building or superstructure shall be erected, together with a convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall also be subject to the lien created by this act, if at the time the work and labor was done or the material furnished the said land belonged to the person who caused the said building, superstructure, or other work to be erected; but if said person owned less than a fee simple estate in such lands, then only his interest therein shall be subject to such liens, and the liens created by this act shall be preferred to every other lien or incumbrance which shall have been attached upon said property subsequent to the time at which the work was commenced or the materials furnished; but nothing herein contained shall be construed as impairing any valid incumbrance upon the said lands duly made and recorded before such work was commenced or materials furnished." Bremen entered into an agreement on the twenty-ninth day of November, 1879, with Foreman and others to supply boards, timber, shingles, etc., to be used in the construction and repairing of a certain mill building, and between that date and the first day of March, 1880, Bremen had furnished a large amount of material for the erection of a mill on some mining property which Foreman had purchased on the eleventh day of October, 1879, from S. Silverburg, Hammerslag, and Collingwood; they being the owners of the mill property, the interest of Foreman in the premises rested upon an agreement for the sale and conveyance of said property. One provision in the agreement was that Foreman should expend the sum of seven thousand dollars in making improvements upon the property to successfully operate and run a quartz mill. Foreman was immediately put in possession of the premises under the contract.

On the twenty-fourth day of December, 1880, Silverburg, Hammerslag, and Collingwood, by a quitclaim deed, conveyed to L. J. Webster the property and premises in ques-

tion. The court below, after finding the facts, decreed a sale of the whole premises, including the interest of Webster as well as the interest of Foreman, and from that decree appellants appeal to this court, and assign, among other causes of error, the rendering of the decree against Webster's interest in the property. This was clearly error, for the statute expressly provides that only the interest of the party who caused the building to be erected or the materials to be furnished shall be subject to such liens. The contract, in this case, for the furnishing of materials was not made with Webster or his grantors, but with Foreman and those acting with him. What, then, was the interest of Foreman in the property in question? For it is upon that interest that the materialman must rely for his remedy. Webster, standing in the shoes of his grantors, has the same rights and protection that they would have had, and his fee can not be taken from him lawfully until the purchase money and interest thereon be fully paid him. Foreman's interest in the premises may be subject to sale in this proceeding. The lien of Bremen is on the interest Foreman had in the premises. The decree should declare the rights of the several parties as herein indicated, subject to the rights of Webster as they existed under the contract between Silverburg, Collingwood, and Hammerslag to Foreman at the time the material was furnished by Bremen, and in default of payment to Bremen, that the premises should be sold, and from the proceeds the amount due under the contract of sale from Silverburg, Collingwood, and Hammerslag to Foreman should be first paid to Webster, and then the materialman, Bremen, should be paid the amount of his lien. And the remainder, if any, after paying these demands and the costs, should be paid to Webster.

The decree must be reversed, and the cause remanded for further proceedings. And it is so ordered.

TERRITORY OF ARIZONA v. POTTER.

FEMALE UNDER AGE OF TEN YEARS IS INCAPABLE OF GIVING CONSENT, by the law of Arizona, and one who has sexual intercourse with such female is guilty of rape.

TO JUSTIFY CONVICTION ON INDICTMENT FOR RAPE, PROSECUTION MUST PROVE, if the female is over the age of ten years, that she offered such resistance as was in her power to make, or that she was prevented from resisting by threats of great bodily harm, accompanied with apparent power of carrying them into execution.

APPEAL from the district court of the first judicial district, county of Pima. The opinion states the case.

M. A. Smith, for the appellant.

Littleton Price, for the respondent.

By Court, PINNEY, J.:

The defendant was tried and convicted for the crime of rape, and sentenced to the territorial prison for life, from which judgment he takes an appeal. The evidence entirely fails to sustain or make a case of rape. If true, it does make a clear case of incest. By the evidence of the daughter of the defendant, it appears that she had been sleeping with and having connection with her father for about one year previous to the finding of the indictment. She testified that she was about twelve years old at the time of the alleged rape. The girl testified that she was at the house of a neighbor; that she had been staying there while her father was out in the mountains at work. In the evening after his return, he called at this neighbor's house, and she went with him to his cabin. He went to bed first, and she got into bed with him. No force and no threats were used up to this time. Sometime after they had been in bed, defendant told her to lie still or he would slap her. No outcry or resistance of any kind was made on the part of the girl, and no force was made by the defendant; and no threats, except to tell the girl to lie still or he would slap her, are anywhere shown in the record. If the facts detailed in the evidence of this case be true, we can scarcely imagine a more horrible case on the part of one calling himself father.

But courts are not organized for the purpose of making laws. We can only construe them as we find them. The law presumes a female of tender years incapable of consenting to sexual intercourse; and a man who has connection with such a female, although she may have consented thereto, is guilty of rape. 1 Whart. Crim. L., sec. 558. What is a female of tender years and incapable of giving consent, is fixed by the statutes of the different states and territories. In this territory, if she be under the age of ten years, she is incapable of giving consent; if over that age and of sound mind, she must resist or be prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution. In this record there is no proof of any imbecility of mind, and the girl being over the age of ten years, the law imposes the duty on the prosecution to show that the girl offered such resistance as was in her power to make, or that she was prevented from resisting by threats of great bodily harm. Nothing of the kind is shown. It appears that the girl has consented to all this intercourse; and consent, even if reluctant, if free, always negatives rape.

For the reasons above given, the judgment and order will be reversed, and the cause remanded for a new trial. And it is so ordered.

GEORGE LOUNT, RESPONDENT, v. LINDA H. LOUNT,
APPELLANT.

MERE NON-APPEARANCE OF FINDINGS OF FACT IN THE RECORD ON APPEAL is not sufficient to show that error was committed at the trial. ERROR WILL NOT BE PRESUMED, but must be affirmatively shown.

APPEAL from the district court of the third judicial district, county of Yavapai. The opinion states the case.

W. S. McPheeters and *J. M. & J. W. Robinson*, for the appellant.

This is an action brought by the plaintiff to obtain a decree of divorce from the defendant upon the grounds of extreme cruelty, to which the defendant filed her answer,

denying that she was guilty of cruelty towards plaintiff, and at the same time filed her cross-complaint, charging the plaintiff with extreme cruelty and inhuman treatment of defendant.

1. The first question for the consideration of the court is, Does the complaint state facts sufficient to constitute a cause of action in this case, under section 3, subdivision 4, page 325, Compiled Laws of Arizona?

2. What acts constitute grounds sufficient for a decree of divorce under act of February 16, 1871, section 3, subdivision 4, page 325, Compiled Laws of Arizona? Are the acts alleged in plaintiff's complaint sufficient? *Rhame v. Rhame*, 16 Am. Dec. 597; *Poor v. Poor*, 29 Id. 664; *Gordon v. Gordon*, 48 Pa. St. 226.

3. Do the findings of fact warrant a decree of divorce in favor of plaintiff?

The findings of fact must be sufficient to support the judgment. *Hardenberg v. Hardenberg*, 54 Cal. 591; *Majors v. Cowell*, 51 Id. 478. They must show extreme cruelty as a fact found. The findings in this case do not show that the defendant was guilty of extreme cruelty. *Haskell v. Haskell*, 54 Id. 262. They must show actual residence within the jurisdiction of the court for the requisite period required by the statute. *Bennett v. Bennett*, 28 Id. 599. They must show that all the allegations in the complaint are sustained by the proofs. *Speegle v. Leese*, 51 Id. 415. They must show findings on all the issues, and respond to each. *Phipps v. Harlan et al.*, 53 Id. 87; *Baggs v. Smith*, Id. 88; *Taylor v. Reynolds*, Id. 686; *Paulson v. Nunan*, 54 Id. 123; *Byrnes v. Claffey*, Id. 155; *Bosquett v. Crane et al.*, 51 Id. 505. They must show findings as to affirmative matter of defendant. The court failed to find upon the issues set out in defendant's cross-complaint. *People v. Forbes*, 51 Id. 628.

The court failed to find upon any of the issues made by defendant's cross-complaint. *People v. Forbes*, 51 Cal. 628.

The decree and judgment are not supported by the pleadings or findings. *Bachman v. Sepulveda*, 39 Cal. 688; *Gregory v. Nelson*, 41 Id. 278; *Morenhaut et al. v. Wilson et al.*, 52 Id. 263.

Charles B. Rush, for the respondent.

Extreme cruelty may consist in the infliction of grievous mental suffering, and such cruelty so exercised is a sufficient ground for divorce under the statutes of Arizona. Comp. Laws, p. 325, sec. 3, subd. 4; Bish. Mar. & Div., secs. 724 et seq., and 733 et seq.

By Court, PINNEY, J.:

In this case a complaint was filed by respondent, charging defendant with extreme cruelty. And in the answer of appellant a cross-complaint is filed charging complainant with extreme cruelty. Both complainant and defendant ask for a divorce. Decree was granted by the court below in favor of respondent, and the case is brought to this court on appeal. And among the points urged in the brief of counsel for appellant as grounds for a reversal are: 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. What acts constitute grounds sufficient for a divorce under the laws of this territory, and is this a case of that character; 3. That the court failed to find upon the issue raised by the cross-complaint. Chap. 31, laws of 1871. Section 3 of the statutes contains seven subdivisions or causes for which a divorce may be granted. The fourth subdivision provides: "For extreme cruelty in either party by inflicting upon the other grievous mental or bodily suffering and other causes. The seventh subdivision provides: "And whereas, in the developments of future events, cases may be presented before the courts falling substantially within the meaning of the law as herein stated, yet not within its terms, it is enacted whenever the judge who hears a case for divorce deems the case to be within the reason of the law, within the general mischief the law is intended to remedy, or within what it may be presumed would have been provided against by the legislature, establishing the foregoing causes of divorce had it foreseen the specific case and found language to meet it without including cases not within the same, he shall grant a divorce." The authorities cited from the decisions of Pennsylvania and other states, as to what acts are sufficient to constitute grounds for a divorce, can not apply under our statute.

The seventh subdivision is certainly very broad and lib-

eral indeed. Arizona may well boast of supporting the most liberal divorce law of any state or territory on the continent. But outside of this provision the bill of complaint states what the acts of cruelty consist of, and states facts sufficient to constitute a cause of action under the fourth subdivision. Counsel insist that the court below did not find upon all the issues raised by the pleading. Even if that were necessary, the evidence not being in the record, it is impossible for this court to determine whether the findings are in accordance with the proofs or not. For aught that appears in the record, no proofs whatever were introduced in support of the cross-complaint. Error will not be presumed, but must be affirmatively shown. Where a case is tried and an appeal taken from the judgment roll, the mere non-appearance of findings of facts does not necessarily establish that error was committed. *Mulcahy v. Glazier*, 51 Cal. 626. It is also claimed by counsel that under the decisions in California, findings must be made on the issue raised by cross-complaint, and *Speegle v. Leese*, Id. 415, also *The People v. Forbes*, Id. 628, are cited in support thereof. In the *Speegle v. Leese* case, the court say that it is the duty of the court below to find on all the material issues made by the pleadings, whether evidence be introduced or not, and in *People v. Forbes*, the court say that as the answer set up new matter, and the court below only found all the facts as stated in the complaint, that was not a disposition of the issues of fact involved in the case. The doctrine thus held is under the present code of civil procedure of that state, and can not be held to apply to cases arising under our statutes. The earlier decisions of the California courts were to the effect that implied findings would be presumed; it is so held in *Buckout v. Swift*, 27 Id. 433. And the same doctrine has been held in this territory in case of *Federico v. Hancock*. It would be a little less than absurd to hold to the rule that whether evidence was introduced or not in behalf of defendant's allegations, the court should find upon those allegations, and in default thereof the judgment should for that reason be reversed. Possibly that might be well enough as a matter of practice, but we have no statute requiring it to be done, and in the absence of such statutes the doctrine of implied findings will be adhered to. The judgment and order must be affirmed.

**THE TOMBSTONE MILL AND MINING COMPANY,
APPELLANT, v. THE WAY UP MINING COMPANY,
RESPONDENT.**

APPELLATE COURT WILL NOT DISTURB FINDINGS OF FACT BY TRIAL COURT, where there is substantial evidence to sustain them, unless errors of law have occurred, requiring a reversal.

OWNER OF MINING CLAIM CAN ONLY FOLLOW HIS VEIN OR LODGE ON ITS DIP, when the vein or lode dips substantially at right angles with the strike of the vein or lode. He can not follow the vein outside of his claim on the course or strike of the vein in any case. If the vein crosses the side lines on its strike, such side lines become the end lines, and terminate the owner's right to follow the vein in that direction.

ORE BODIES FORMED OFF FROM AND CONNECTED WITH A FISSURE VEIN do not form a separate vein, lode, ledge, or mineral deposit,

APPEAL from the district court of the first judicial district, county of Cochise. The facts are stated in the opinion.

John Haynes and Thomas Mitchell, for the appellant.

For the purpose of this argument on appeal, there is no dispute that the Good Enough claim was duly located March 25, 1878; that the Way Up claim was duly located September 26, 1878; that the appellants own and are in possession of the said Good Enough claim, and the respondents own and are in possession of the Way Up claim; and that these claims are substantially at right angles to each other, the northerly side line of the Good Enough coinciding with the southerly end line of the Way Up claim.

The action was brought by the appellants, plaintiffs below, to recover possession of part of the Good Enough lode, which underlies the surface of the Way Up claim, from which they alleged they had been ousted by the respondents, defendants below. They alleged that the top or apex of the Good Enough lode lay within the side lines of the Good Enough claim, and that said lode, in its course into the earth, so far departed from a perpendicular that it entered the land adjoining, to wit, the land underlying the Way Up claim; that the Way Up company had sunk a shaft from the surface of their claim about five feet away from the Good Enough side line, and had broken in and taken possession of a part of the Good Enough lode, which this shaft had broken into on the dip of such lode.

The answer in effect denies that the top or apex of the Good Enough lode lies within the surface side lines of the plaintiffs' claim and that that lode enters the Way Up claim upon its dip; and alleges that the lode crosses the Good Enough claim and enters the Way Up claim on its strike.

If the allegations of the complaint were true, the plaintiffs were entitled to recover the ground in controversy under the plain provision of section 2322 of the revised statutes of the United States.

If the allegations of the answer were true, the plaintiffs could not recover, because they could not follow the vein on its strike beyond the plane of their north-east side line carried down vertically: *Mining Co. v. Turbet*, 8 Otto, 463.

Upon the trial below, the plaintiffs, to prove the allegations of the complaint, offered evidence to show that a stratum of limestone outcropped at different places within the side lines of the Good Enough claim; that the strike of this limestone was substantially parallel with the side lines of that claim, and that it dipped into the earth in a northeasterly direction and under the Way Up claim at an angle of from twenty degrees to twenty-four degrees from a horizontal; that overlying the limestone and conforming with the curves of the top of it, was a body of rock called shale; while underlying it and conforming with the curves of the lower limits of it was a body of rock called quartzite; that within this limestone belt, at different places, there were discovered bodies of valuable ore bearing silver and other precious metals; that these ore bodies varied in size and shape and in the angle of inclination to the horizon, some being nearly vertical, some nearly horizontal, some at other angles; that these ore bodies were all connected together by smaller ore bodies or stringers; that the lime was not one solid mass, but, like all limestone deposits, was in different strata, some twelve or fifteen in number, which were sometimes split up into a number of others; that in every case, so far as developed, the spaces between the blocks of the lime were mineralized and sometimes opened into the large ore bodies; that the ore bodies were of two kinds, those which followed strictly these lines, called bedding lines, and lay between the lime strata, and those which entered and occupied the mass of the rock; that the differ-

ent ore bodies as developed extended a distance of four hundred and forty feet lengthwise of the claim, dimensions being taken parallel with the side lines [Map No. 4]. That the yield of ore within these limits had been about twenty-one thousand tons, of which only about one sixth came from the vertical ore bodies and five sixths from the flat ones; that the outcropping of this limestone belt within the lines of the Good Enough would assay in mineral, and in many places the mineral itself came to the surface; that the discovery shaft of the Good Enough lode was sunk upon an outcrop of ore in this limestone; that incline number 2 was sunk on mineral all the way down from the surface to the point where it met the plane of the north side line of the Good Enough claim and broke into the defendants' workings; and they produced assays taken along that incline every ten feet; that the limestone belt varied in thickness, measured at right angles between the shale and the quartzite, from sixty to ninety-five feet, and the boundaries between the underlying quartzite and the overlying rock were clearly distinguished and distinguishable; and that in all their developments no ore had been found outside of these limits, except here and there small insignificant deposits, such as were always to be found in the country rock in the immediate neighborhood of a large lode.

They also proved that this limestone belt was much thinner than the Eureka, which in places was eight hundred and four hundred feet wide on the surface.

The defendants, to prove the denials and allegations of their answer, offered evidence to prove that instead of one body of limestone with well-defined upper wall of shale and lower wall of quartzite, outcropping in the Good Enough claim, there were in fact alternate strata of limestone, shale, and quartzite, as shown on their maps B and C, which ran diagonally across that claim; that the Way Up shaft was sunk upon a true fissure vein which penetrated the shale from the surface down to the limestone, claimed as their lode by the plaintiffs, passing through alternate strata of shale and limestone before it reached that body, and which, after it had passed that body, penetrated the quartzite claimed by the plaintiffs to be the foot-wall of their lode, and penetrated another body of limestone under

the quartzite; that this fissure vein had well-defined walls and could be distinctly traced from the Way Up shaft across the Good Enough claim, into and across the Toughnut claim, which lies parallel with and south-west of the Good Enough claim, as shown by the red line, marked "Way Up Lode," on their map B. Also to prove other vertical veins crossing the Good Enough claim substantially parallel with the Way Up vein; and that the course of these veins was the general strike of the veins in the immediate neighborhood. Also to prove where the ore in the Good Enough mine came from, and that the Way Up fissure vein was the highway by which it came, whether from above or below, and the ore bodies found in the lime to the one side or the other of this fissure had overflowed from this fissure.

In rebuttal, the plaintiffs called two witnesses to prove that this "true fissure vein," which the defendants called the Way Up vein, was so irregular and hard to be discovered in the Way Up shaft, that a few days before the trial, the defendants put two men to work in the Way Up shaft, with orders from the foreman of the defendants' company to sweep down and clean up the shaft, and if they could find any seam or crack to pick it out so that it would show plain, so that if any witnesses were brought down they could trace it, and that that work was accordingly done.

The court below found against the plaintiffs, and entered judgment on the findings for the defendants.

The plaintiffs thereupon moved for a new trial, for the reasons set forth in their notice, and in the assignment of errors.

When this motion came on to be heard, the court below refused to hear any argument of it, and without examining the evidence or the affidavits of newly acquired evidence, or in any way passing upon the merits of the motion, overruled the motion, *pro forma*, for the reason set forth in the bill of exceptions.

In support of the several assignments of error, we submit:

1. The plaintiffs having been refused a hearing upon their motion for a new trial in the court below, this appeal should be heard in all particulars, as if on a motion for a new trial.

The reasons set forth in the bill of exceptions for the *pro forma* ruling on the motion for a new trial make this point so clear that it certainly can not be necessary to argue it.

But we shall argue, not merely that the findings are against the weight of the evidence, but that there was no evidence to support them, in which case this court will reverse the judgment, even after a motion for a new trial has been fully heard and determined. See *State of Nevada v. Mining Co.*, 5 Nev. 415, in which the authorities are so fully reviewed by the chief justice that it seems unnecessary to refer to any other cases. If it were necessary, we should be willing to argue the question under the extreme rule cited by him from New York, that to authorize the supreme court to grant a new trial, "there must be a preponderance of evidence against the findings of the jury, so great as to satisfy us that there was either an absolute mistake on their part, or that they acted under the influence of prejudice, passion, or corruption."

We refer also to the authorities collected in Hilliard on New Trials, c. 14, 2d ed.; *Reed v. Reed*, 4 Nev. 395; *Tunnel Co. v. Tunnel Co.*, 37 Cal. 40; *Minturn v. Burr*, 20 Id. 48; *Dean v. King*, 22 Ohio St. 134; *Altschul v. Doyle*, 48 Cal. 535; *Insurance Co. v. Wilson's Heirs*, 8 Pet. 303; *McGatrick v. Wason*, 4 Ohio St. 575.

2. A new trial should have been granted, because there was no evidence in the case to support the findings of fact, which are not only against the weight of the evidence, but are palpably contrary to the evidence.

The first and second findings simply find the due incorporation of the two companies, plaintiff and defendant, and their title to their respective mining claims.

The findings to which we refer are the following:

3. That there is no vein, ledge, or lode, so far as shown by the evidence, running through the said Good Enough claim parallel with its side lines, but the only vein, lode, or ledge shown by the evidence runs across the said Good Enough claim, and crosses the side lines thereof and enters the Way Up claim on its strike, and the ore mined and taken out by the Way Up Mining Company, defendant, and claimed by the plaintiff herein, was from the said vein, lode, or ledge extending on its strike or course, as aforesaid, across plaintiff's said Good Enough claim in a north-easterly direction, beyond its side line and into defendant's Way Up claim.

4. I find that the plaintiff has not within the boundaries of its said claim and the extended side lines of defendant's claim any mineralized ledge, lode, or vein, belt or zone of rock dipping beyond its side lines into the Way Up claim as alleged and described in the complaint, but that all ore shown by the evidence to have been found within the said Good Enough claim and the extended side lines of the Way Up claim came from, and was connected with, and a part of the said vein, lode, or ledge which upon its strike in a north-easterly direction enters the Way Up claim.

5. I further find that there is no vein, ledge, or lode, or mineralized deposit having its apex within the exterior boundaries of plaintiff's claim except that which crosses the said side lines thereof and enters the Way Up claim.

6. I find that there is no vein, lode, ledge, or mineralized deposit having its apex within the exterior boundaries of plaintiff's said claim, dipping beyond the side line of plaintiff's said claim into the Way Up claim.

We contend, in the first place, that there is no evidence in the case to contradict the positive proof that there exists a belt or zone of limestone which outcrops on the Good Enough claim; that this limestone lies between well-defined limits, having under it a stratum of quartzite and over it shale and other rock in place, and that large bodies of valuable ore bearing precious minerals, gold and silver, are found within this limestone belt or zone; and so far as developments show, and the evidence shows, there is no mineral to be found outside this limestone.

We say the evidence is uncontradicted on this point.

As to the existence, extent, and limits of the limestone belt:

Map number 2 of the plaintiffs is a section through the plane of incline number 2 on the Good Enough lode. Map C of the defendants is the same. Both show the different strata of rock which form the earth's surface at this point, and both represent these strata as dipping at an angle of about twenty-four degrees from the horizontal out of the Good Enough ground into and under the Way Up claim.

It appears, from the uncontradicted evidence in the case, that there exists a belt, zone, or stratum of limestone lying between a rock called shale above it, and a different rock

called quartzite below it, of a width of from sixty to one hundred feet measured at right angles to these boundary rocks, which outcrops upon the Good Enough claim opposite the Way Up claim, and dips into the earth from the Good Enough claim at an angle of about twenty-five degrees, and under the Way Up claim; that the shaft sunk by the Way Up Company near the Good Enough north side line cuts this limestone, and their incline from that shaft is upon a body of ore found in that limestone, and is a continuation of the same body of ore the plaintiffs were working upon in the lower portion of their incline 2, and that large quantities of ore have been found in this limestone extending over a distance of four hundred and forty feet measured parallel with the Good Enough side lines (without counting the ore body in the Good Enough entirely west of the Way Up claim, known as the combination ore body, to which particular reference will be made in speaking of the affidavits of after-acquired evidence, filed with the motion for a new trial), and that all the ore found by either party, with insignificant exceptions, has been found in this limestone zone.

It is evident, therefore, that when the learned judge in the court below found as a conclusion of fact "that the plaintiff has not, within the boundaries of its said claim and the extended side lines of the defendants' claim, any mineralized ledge, lode, or vein, belt or zone of rock dipping beyond its side lines into the Way Up claim as alleged and described in the complaint" (fourth finding); nor "vein, ledge, or lode or mineralized deposit having its apex within the exterior boundaries of plaintiff's claim" (fifth finding); and when he found that "there is no vein, ledge, or mineralized deposit having its apex within the exterior boundaries of plaintiff's said claim dipping beyond the side line of plaintiff's said claim into the Way Up claim" (sixth finding), he found not merely against the weight of the evidence, but against the uncontradicted testimony of the witnesses on both sides.

If he meant by his findings that the mineralized belt or zone of limestone, which both sides agree had its apex within the plaintiffs' claim, was not a "mineral vein, lode, or ledge" within the meaning of the act of congress, then

the finding is one of law and not of fact, but as such it is equally erroneous.

This point was elaborately discussed in the case of *The Eureka Co. v. The Richmond Co.*, 4 Saw. 302.

In that case, as in the present, a limestone belt or zone of rock was claimed as the lode. We learn from the report of the case that the limestone lay between an underlying quartzite several hundred feet in thickness and an overlying belt of clay or shale ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone the quartzite and shale approached so closely as to be separated by a bare seam less than an inch in width. From that point they diverged until on the surface of the Eureka mine they were about five hundred feet apart, and on the surface of the Richmond mine about eight hundred. Throughout this limestone, in various forms, mineral was found, sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times it would seem to be scattered grains. And we learn from Professor Keyes (who was a long time superintendent of the Eureka mine) in his testimony in the present case, page 300, that not more than one per cent. of this limestone contained pay ore.

The court, all the judges, Field, Sawyer, and Hillyer, uniting in the opinion, held this limestone zone to be a vein or lode, and their judgment was affirmed on appeal by the supreme court of the United States, 13 Otto, 839. In the supreme court Chief Justice Waite, after reciting the patents to the Eureka and Richmond companies, says: "In this way the companies received from the United States the right to work the entire metal-bearing rock from the quartzite to the shale between the end lines of their patented surveys extended downwards and following the dip of the mineralized limestone zone."

We forbear to make any extracts from the opinion in the court below, but commend the whole of it to the careful consideration of the court. And we submit that the case is, in all essential particulars, exactly like the one now before the court.

Finally, we submit that a new trial should have been

granted, because the court erred in entering judgment for the defendants upon the findings.

1. The findings do not support the judgment.

In the former part of this brief, when we were arguing that the evidence did not support the findings, we were obliged to assume, for the sake of the argument, that the court had found such and such facts against us. Now, however, we are obliged, of course, to assume in like manner that the evidence supports the findings.

In determining whether or not the findings support the judgment, the court will not look beyond the judgment roll; the sufficiency of the evidence is admitted by the objection just as the facts in a pleading are admitted by a demurrer. It is upon this basis that we proceed to argue the question.

The test of the sufficiency of a finding is: Would they answer if presented by a jury in the form of a special verdict? *Breeze v. Doyle*, 19 Cal. 101.

The statute in this territory provides in regard to special verdicts as follows: "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them; and these conclusions of fact must be so presented that nothing remains to the court but to draw conclusions of law from them. Comp. Laws, p. 435, sec. 2613.

Section 2618, p. 436, provides that when the issue of fact is tried by the court, the facts found and the conclusions of law shall be separately stated.

The object and absolute necessity of these rules will appear upon a moment's consideration.

Every pleader knows how difficult it often is to determine whether a proposed allegation is a statement of an ultimate fact or of a mere conclusion of law. In reality, the allegation of the most simple commonplace facts often includes necessarily a conclusion of law. Thus, the ordinary allegations "that the plaintiff is a corporation;" "that the plaintiff was and is seised in fee;" "that the cause of action did not accrue" within the period named in the statute of limitation, although each one of them is the plain statement of an ultimate fact, according to approved precedents,

it includes also a mere conclusion of law. In a case in which either of the first two, for example, was a material issue, if the record simply showed a general verdict or a finding "that the plaintiff was not a corporation," or "was not seised in fee," followed by a judgment for the defendant, it would be impossible for any one to tell upon what questions the trial had turned, whether the plaintiff had failed to prove his allegations as facts, or whether upon the facts proved the court had ruled that as a conclusion of law they did not show incorporation or title in fee. If such a practice prevailed it would be necessary in every case appealed, to bring all the evidence into this court in order to determine whether the judgment was correct, although in reality there might have been no dispute upon the facts on the trial, but the only question discussed there had been, what conclusions of law followed the unquestioned facts.

Such a practice, apart from its inconvenience, as requiring this court in every case to try the whole question over again, would work rank injustice, by reason of the delays and useless expense incident to it.

To avoid just such consequences, we have the well-settled rules as to instructions to the jury when they are expected to return a general verdict, and we have the above express provisions as to special verdicts and findings.

Now, to apply what we have said to the present case. The allegation in the complaint that within the Good Enough claim "there was and is a well-defined vein, lode, ledge, and mineral deposit, or mineralized belt or zone of rock in place, bearing silver, etc., the top outcrop and apex of which lies inside" the boundaries of said claim, although, according to approved precedents, the proper statement of the ultimate facts necessarily includes a conclusion of law, viz., that the mineralized belt or zone of rock in place is a vein or lode. Had the case been tried before a jury the court would have been asked by the plaintiffs to charge, among other things, "that a mineralized belt or zone of limestone rock in place, having a well-defined hanging wall of shale and foot-wall of quartzite, and which outcropped upon the surface and dipped into and under the ground at an angle of twenty-four degrees,

was a vein, lode, or ledge within the meaning of the act of congress. And that if they found from the evidence that the plaintiffs had the outcrop of such a limestone zone within the exterior limits of the Good Enough claim, and that the limestone was mineralized, and that it so far departed from a perpendicular in its course downward into the earth as to enter the Way Up claim, etc., then their verdict should be for the plaintiff."

Had the court refused such an instruction the cause would have stood in this court upon a mere question of law, viz.: Whether or not the court erred in refusing to so instruct? Had the court given the instruction, and the jury found for the defendants, the only question would have been one of fact—was the verdict supported by the evidence?

But we submit, with very great confidence, that if the court, instead of thus stating to the jury the facts, which it was their province to decide, and telling them what the law was as applicable to such facts, had merely instructed them that "if they found from the evidence that there was within the Good Enough claim the outcrop or apex of a mineralized vein, lode, or ledge, belt or zone of rock, which dipped, etc., their verdict should be for the plaintiffs, otherwise for the defendants," that this court would not hesitate to say that such instruction was too general, and that it left the jury to decide all the law as well as the facts, without any assistance from the court, whose province alone it was to decide the law. And so if the court had ordered the jury to find a special verdict, and they had found in general terms "that there was no mineralized vein, lode, or ledge, belt or zone of rock, etc.," it would appear for the same reason that no judgment could be entered on such a verdict, for it would not so present the facts "that nothing remained for the court but to draw a conclusion of law from them." It would be a verdict which was a conclusion of fact or of law, according to the meaning which it was intended to express.

Now, when an issue of fact is tried by the court without a jury, there are, of course, no instructions. But the same result is reached by requiring the court to state separately the conclusions of fact and the conclusions of law. And if the findings are so worded that it is impossible to tell from reading them exactly what the judgment is based upon, if

they are susceptible of several different constructions, if it is necessary to look into the evidence to understand them, then they do not comply with either the letter or the reason of the law, and will not support a judgment. Now that is exactly what we find in the present case. Read in the light of the evidence, bearing in mind that there were two veins or lodes spoken of by the witnesses—the Good Enough limestone lode and the Way Up fissure vein—that the defendants did not attempt to prove that the former did not have the strike and the dip the plaintiffs claimed it had, but simply denied its existence in fact and in law, and that the plaintiffs did not attempt to prove that the Way Up fissure vein, if it existed, had not the strike the defendants claimed it had—with the aid of all this outside light we are able to understand that the vein, etc., which the court finds in the first part of the third and fourth findings, is not shown by the evidence and does not exist within the Good Enough claim, is the Good Enough lode; and the vein, etc., referred to in the latter part of the same findings, and to which he finds all the ore belongs, the Way Up vein. But this court can not go outside of the language of the finding, in this way, and wander through eight hundred pages of testimony to ascertain what they mean. That question must be determined by simply reading them. And without any evidence *aliunde*, it is impossible to say with certainty what they do mean. An “expert,” if he were on that side of the question, might say that he saw some “evidence” that the meaning was that the court found that the vein alleged by the plaintiff in his pleadings did not run parallel with the Good Enough claim and enter the Way Up claim on its dip, but did enter that claim on its strike. But we hardly think that, grammatically, they will bear that construction. Grammatically construed, the last part of both the third and the fourth findings refers to a different vein, etc., from the vein, etc., mentioned in the first part.

But admitting that they will bear this construction, it is perfectly plain that all the findings, beginning with the third, may be construed as merely finding, as a conclusion of law, that the mineralized deposit, belt, or zone of rock is not in law a vein, lode, or ledge.

The fact that they will bear several constructions is in

itself fatal to them, and we submit that construed in any way they are no more a statement of the facts found than if the court had briefly said: "I find, as a conclusion of fact, that the plaintiff can not recover."

The first conclusion of law finds that the Way Up Company owns the Way Up mining claim, which is utterly immaterial as affecting the right of the plaintiffs to recover. Then it finds that said company owns "all mineralized veins, etc., within its exterior boundaries, and is entitled to recover the same, and to work the same to any depth between vertical planes extending down through its end lines, and to follow the same on its dip beyond its side lines to any depth."

This is not good law to begin with, because they only own such veins, etc., the top or apex of which lie within their side lines, and then they were not seeking to recover anything; they were defending against the plaintiffs' claim to recover. But supposing that the words "top or apex of the veins," etc., were omitted by mistake, and that the clause about recovering was due to forgetfulness as to which side the Way Up Company was on in the case, and substituting the word "their" for "its," before the word dip—for that word refers, as it stands, to the Way Up claim, and not to the veins, etc., and the intention must have been to decree the company's right to follow the veins on their dip, and not on the dip of the claim—we say, after these insertions and amendments the conclusion of law is a correct one as a statement of mining law, but it is altogether outside of this case. It would have been just as correct and just as material if it had also contained the statement that "under the constitution of the United States the said company can not be deprived thereof except by due process of law."

The second finding is the only intelligible one, but it requires some facts behind it to give it any validity.

The various steps in the progress of an action are, first, the pleadings, which settle what the issues are, then the trial of the issues in the *nisi prius* court, then the review of the case in the same court on motion for a new trial, and finally the review in the appellate court. Throughout all these steps a process of elimination goes on. The rules of pleading are intended to get rid of useless and uncontro-

verted statements of fact, and to present for trial merely the material issues of fact which result from the allegations on one side and the denials on the other, or the issue of law upon an admitted statement of the facts. The rules of practice are intended to produce the same effect in the subsequent stages of the cases.

Many points which are urged on the trial at *nisi prius* are often seen by counsel, on reflection, to be untenable or unimportant, and are therefore abandoned; and it is well settled that upon the review on the motion for a new trial, and again on appeal, the court will look only to the particular errors which are properly assigned or specified. And besides these rules which bind the parties, we have rules of practice which bind the courts, requiring them to properly submit to the jury the questions of fact arising under the evidence, and to properly instruct them upon the law applicable to those facts, and requiring them when there is no jury to state separately "the facts found and the conclusions of law." And these words do not mean mere statements of facts and statements of law; they mean the facts found from the evidence and the conclusions of law resulting from these facts found. And we submit that these rules are not merely for convenience, but they confer a right just as important and just as sacred as the right to the trial itself. The parties have the right not only to have the case tried, but to have it tried in such a manner that it will not be necessary to go over the whole case in its subsequent stages; to have it so tried that all irrelevant, useless, and uncontroverted questions may drop out by the way, and when the case reaches the appellate court nothing but substantial matters in dispute shall remain. If the case is not so tried, the losing party, however strong his case may be, runs a double risk in this court. If his attorneys do not submit to the necessities of the case, and argue the whole case *de novo*, the court is apt to fail to discover the real question, and to decide against him upon the general presumptions in favor of the judgment; while if the whole case is fully presented he runs the risk of a very natural presumption that if it requires so long an argument to show that the judgment is wrong, it was probably right.

We submit, therefore, that this court need not look at the

transcript in this case, unless they do so for the purpose of entering a final judgment, for that upon the face of the findings there is nothing whatever to support any judgment.

The so-called findings of fact are not a statement of the facts found from the evidence, but are mere conclusions of law, or at best a mere general finding negating the allegations of the complaint, and are as indefinite as a general verdict; and the so-called conclusions of law do not result from any facts found, but are mere statements of general propositions and incorrect statements into the bargain.

We refer particularly to the charge to the jury in *Stevens v. Williams*, 1 McCrary, 480, because it illustrates what we have said in regard to the manner in which the questions of law and of fact are separated when a general verdict is expected, and because the issues in the case and the facts as disclosed in the evidence were almost identical with those in the present one; and also because Mr. Justice Miller, of the supreme court of the United States, who presided at the trial, expressly adopted, in his charge to the jury, the law as laid down in the Eureka case.

Also upon the same point, to the charge of Judge Hallett in the United States circuit court at Denver, in *Iron Mine v. Loella Mine*, 2 McCrary, 121; *Iron Silver Mining Co. v. Cheeseman*, Id. 191; *Gallagher v. Williamson*, 23 Cal. 332; *Allison v. Hagan*, 12 Nev. 60.

We refer, generally, as to special verdicts and findings, to *Polhemus v. Carpenter*, 42 Cal. 375.

The court says, at page 386: "The findings are so manifestly defective as not to require comment. Instead of stating facts involved in the issues, they contain only general conclusions drawn from the facts. They afford no information whatever as to the particular facts which the court considered as established in the cause. The defendant was clearly entitled to have more specific findings within the issues; and on this ground the judgment should be reversed and a new trial awarded."

This decision was made under the act of 1861, which required a demand for findings if the party desired them, and under which the doctrine of "implied findings" arose in California.

In 1872, the law was passed which is the same as section

2618 of our compiled laws. We call attention to the fact also that we have no such provision as is mentioned in some of the California and Nevada cases, requiring exceptions to the findings. Section 2629, Comp. Laws, p. 438, provides that when the case is tried by the court, and the decision is not made immediately after the closing of the testimony, which was the case here, it shall be deemed excepted to on motion for new trial or on appeal without any special notice that exception is taken thereto.

The Nevada statute is cited at length in *Whitmore v. Shiverick*, 3 Nev. 312, and the change in the California practice introduced by the code of 1872 is pointed out in *Dowd v. Clarke*, 51 Cal. 262.

We submit, however, that it is only a defective finding which requires to be specially excepted to even in those states. *Putnam v. Lamphier*, 36 Cal. 158.

The rule and the reason of it are analogous to the distinction between a general and a special demurrer.

The objection to the jurisdiction, or that a complaint does not set forth facts sufficient to constitute a cause of action, may be made for the first time in the supreme court.

And upon principle the same rule should be applied to the objection that there are no findings to support a judgment. That objection does not mean merely that the findings are defective in some particular, but that there is nothing upon the record to support the judgment. See *Barnes v. Sabron*, 10 Nev. 217, and in particular the argument of counsel for the respondents, at page 224, and the reply to it in the opinion, page 248. See, also, *Hidden v. Jordan*, 28 Cal. 306; *Figg v. Mayo*, 39 Id. 265; *Coveny v. Hale*, 49 Id. 552; *Baggs v. Smith*, 53 Id. 88; *Dilla v. Bohall*, Id. 709; *Woodson v. McCune*, 17 Id. 298.

As to specifications of error, and the reason for requiring them, see *Barrett v. Tewksbury*, 15 Cal. 354.

The findings are further fatally defective because they are findings upon facts entirely outside of the issues.

If the evidence offered by the defendants is examined with reference to the pleadings in the case, it will be seen that the great bulk of it was entirely irrelevant. The only real question for the court to determine under the plead-

ings was, whether the plaintiffs had the top or apex of a mineral vein or lode within the side lines of the Good Enough claim, which vein or lode entered the Way Up claim on its dip. This was the substance of the allegations of the complaint, and the answer simply denied them because the allegation that the only lode the plaintiffs had, entered the Way Up claim on its strike, is merely the repetition, in an affirmative form, of the denial that it entered that claim on the dip.

Now, when we examine the evidence we find that this question was, as we have already pointed out, a mixed one of law and fact. The questions of fact presented by the evidence were, whether a mineral-bearing limestone zone outcropped within the side lines of the Good Enough claim, and if so, whether this limestone zone entered the Way Up claim on its dip.

And the question of law was, whether if the limestone zone existed it was a vein or lode within the meaning of section 2322 of the revised statutes of the United States.

Now, as the plaintiffs did not attempt to show that they had any vein in their ground except the limestone zone, it follows that if the court found against them on either the above questions of fact or of law, that ended the case, and all the evidence about this Way Up fissure was utterly immaterial. In actions of this kind all that the defendant has to do to win is to show that the plaintiff has no title; he does not have to show any right or title in himself. And if the plaintiffs, either as a conclusion of law or of fact, did not have the apex of a mineral vein within their side lines, they could not claim the right to enter the Way Up ground; for that right, unknown to the common law, is granted by the above section 2322 merely as incident to the ownership of the apex of a mineral vein which on its dip enters the land adjoining.

And on the other hand, if the court found that the limestone zone did exist, and did outcrop and dip, as alleged in the complaint, and that in law it was a vein or lode, then all this evidence about a cross fissure was equally irrelevant, because the Good Enough claim, being the older location, was entitled to all the ore contained within the crossing or "space of intersection." In either view of the case, there-

fore, the whole of this evidence about this Way Up fissure was utterly irrelevant.

The only facts, therefore, which it was necessary for the court to find were: 1. Whether or not the plaintiff had within the exterior boundaries of the Good Enough claim the outcrop, top, or apex of a well-defined mineralized belt or zone of limestone. 2. If so, whether or not it entered the Way Up claim on its dip.

Of course there were other issues, such as the incorporation, title, etc., but these were the only facts of importance for the purpose of this argument. In a case which took so long as this to try, and in which there was so much evidence introduced, it would perhaps have been more convenient for the court to have been more specific—to have stated the probative facts from which he found that the limestone was or was not well defined, mineralized, etc., as was recommended in *Morrill v. Chapman*, 35 Cal. 85; but the above were, we conceive, the ultimate facts from which the necessary conclusion of law would follow. But instead of finding these facts one way or the other, the only facts found are based upon the evidence about the Way Up fissure, and the opinions of the experts as to where the ore came from; and an examination of the whole case shows that the judgment was determined—if we admit that it was the result of ratiocination at all—by the effect produced upon the court by the evidence upon these wholly irrelevant matters.

That a judgment based on findings of fact outside of the issues is erroneous is a proposition which certainly requires no argument. We refer, however, to *Morenhout v. Barron*, 42 Cal. 605; *Devoe v. Devoe*, 51 Id. 543; *Robinson v. Pittsburg R. R. Co.*, 57 Id. 417.

And even if the findings in the case were unexceptionable, upon no conceivable theory could the court enter such a judgment as the record in this case discloses.

The only judgment the defendants were entitled to was that "they go without day and recover their costs, and that the temporary injunction be dissolved."

Instead of this, the judgment, after reciting in full the findings, proceeds to order, adjudge, and decree *verbatim* all and singular the matters of fact and of law found therein. We are so confident that the judgment in this case must be

reversed on the merits, that it is useless to dwell on minor errors, but we call attention to *House v. Mullen*, 22 Wall. 42; 420 Min. Co. v. *Bullion Mining Co.*, 3 Saw. 634; *Speyer v. Ihmels*, 21 Cal. 280.

In *Knowles v. Inches*, 12 Cal. 214, Judge Baldwin, in delivering the opinion of the court, said: "We must reprehend the practice, which is too common, of stuffing a transcript with irrelevant and unnecessary matter. The present case affords a remarkable illustration. The transcript contains some two hundred and thirty-three pages, when everything essential to a review of the case might easily have been given in fifty. Besides the delay, unnecessary expense, and labor thus created, the points are hid in this mass of superfluous matter, and it frequently becomes more difficult to find out what they are than to decide them when found."

We think the court will see that no apology is necessary from the present appellants for the very voluminous record in this case.

The fault certainly is not theirs. It results from the manner in which the trial was conducted.

Everything that was offered under the name of testimony was allowed to go in, and we believe the record shows but one single instance of an objection to evidence being sustained, and that was based upon grounds which generally prevail even in a justice's court. And then, after holding the case under advisement for five months, his honor filed the so-called findings, which we have been discussing, which failed to disclose expressly any of the reasons which led to his decision and left the case to be tried all over again in its next stage. And as the appellants failed to get a hearing on their motion for a new trial, and have appealed to this court on the ground, among others, that the findings are not supported by the evidence, they were compelled to bring here all the evidence. We have contended that the great bulk of it was irrelevant in the court below, but the necessity to have it all here in order to have a hearing on the questions raised by the appeal from the order overruling the motion for a new trial, makes it material in this court.

But we have cited Judge Baldwin's dictum to call particular attention to the concluding paragraph. Recognizing the truth of what is there said, we have labored hard to

perform the difficult task of finding out the points of the case amid the superfluous matter in which they have been so carefully hidden; of ascertaining what points are uncontroverted in the evidence and what points are irrelevant; in other words, of finding what there is to be decided in this court, and then stating it in such manner that nothing remains for the court but the comparatively easy duty of deciding it. This is the labor which the court below should have performed. To accomplish this same result is the very object of the law which requires the "facts found and the conclusions of law" to be separately stated, and if our success bears any just proportion to the time and labor spent in these efforts, we feel that no apology is necessary from us for the length of this brief.

We respectfully suggest that sufficient of the evidence appears in our discussion of the second point to enable the court to dispose of the different objections to the findings discussed under the third point, and that if those objections, or any of them, are well taken, it will be unnecessary for the court to encounter the labor of even reading the transcript.

And, in conclusion, we have only to say that voluminous as the record is, and immense as have been the labor and time expended upon this case, it has no claim to rank as a case of even ordinary difficulty. It presents the simplest possible questions both of fact and of law.

Viewed from the standpoint of facts, the case is no new one. It is simply the case of one party owning a rich and valuable mine, and working and developing it in the manner permitted to him by law; of the other party, beginning by casting envious eyes upon his neighbor's luck, and ending by breaking into that neighbor's mine, through his wall, like a burglar—in the dark. Every mining camp has seen at least one such experiment, and owing to the prejudices and ignorance of jurors, and sometimes to the inability of the judge before whom the case comes, to find the points of the controversy amid the rubbish with which experts, falsely so called, are able to surround them, speculations in mining of that character have sometimes been made to pay.

Viewed from the standpoint of the law, however, the present case is unique. In all other such cases that we

have any knowledge of, some grave question of law has arisen for the first time, and the interest of the case to all outside of the parties immediately concerned has turned on the decision of this new question. But all the law of this case had been decided before it began. That the defendants had no real hope of distinguishing it from the Eureka case, is apparent from the desperate efforts they made to enlarge a little seam (which one of their own witnesses, a miner, said—looking up for inspiration from above to enable him to describe it—was like “that crack in the ceiling”) into a “true fissure vein,” by “retaining” experts to swear that it was. And as the most unique feature of all, it appears, after all the evidence on this point has been received, that the plaintiffs could afford to admit all that it was offered to prove, and even that the crack was a well-defined fissure vein, as many feet wide as the defendants chose to say it was, without, in the slightest degree, affecting their right to recover in the case.

The odd feature of “a great mining suit,” of the class to which the present one belongs, is that it is looked upon by all outside observers as a game of chance. They have no doubt about the right of the matter, but merely of the result. There is not enough question about the right of the matter to get up a discussion. The interest in the game lies in the uncertainty of the result. And upon this subject parties are equally divided according as they put their faith in this or that expert or lawyer, and the ability of their champion to muddle the matter, to work upon the passions or prejudice of the jury, or by their eloquence to sway their judgment.

Now we submit that a game like this should end in this court. The whole testimony is before the court, and their power to enter a final judgment is, we submit, complete. R. S. U. S., secs. 1868, 1869; Comp. Law, sec. 2342; Id., p. 15, sec. 2; p. 20, sec. 10.

But, if this case must go back for a new trial and the farce be played over again, we respectfully ask the court to settle the law of the case now, and to brush away all the rubbish about the Way Up vein and the theories about where the ore came from, etc., so that the trial may be had upon the only issue of fact in the case, viz., the existence of the limestone lode.

Lewis & Dibble and J. D. Rouse, for the respondent.

The plaintiff in this action bases its right of recovery upon the assumption that there is a great mineralized belt or zone of limestone within its boundaries, lying between a hanging wall of shale and foot wall of quartzite, having its course or strike substantially parallel with the side lines of its Good Enough claim, and that such belt or zone on its dip enters the defendant's claim. And it is claimed that the ore extracted by the Way Up company was from the ore body or zone so dipping into its claim from the Good Enough. This theory was attempted to be sustained by proof that large bodies of ore had been discovered and mined by the plaintiff, which had a general direction with the side lines of its claim.

The defendants, on the other hand, contended that there is no such belt or zone of mineral-bearing rock, having a direction or strike as claimed by the plaintiff, but claimed that there is a true fissure vein crossing both side lines of the plaintiff's claim and entering the Way Up ground on its strike; that the lateral ore bodies found in the Good Enough are simply flat or blanket bodies, which were deposited in the limestone from the fissure, and that they form a part of such fissure and are invariably connected with it.

After the facts were shown by plaintiff that shale was found, apparently forming a hanging wall, and quartzite a foot wall, and that ore bodies were found having, as we have stated, a general direction parallel with the side lines of its claim, the defendant established, by uncontroverted proof, the existence of a cross fissure as above stated, and that such fissure possessed the chief and distinguishing characteristics of a true fissure vein—namely, that it cut and penetrated all the formations, homogeneous and non-homogeneous rocks, the shales, limestones, and quartzites, and that its strike was nearly at right angles with the plaintiff's so-called limestone lode or belt, and also with the side lines of its claim; that such fissure is a true vein, and that it can be readily traced far beyond the plaintiff's side lines into adjoining claims.

We also showed that the fissure is traceable from the surface continuously down the defendant's shaft and into its

very deepest workings, two hundred and eighty-six feet below the mouth of the shaft, and from the shaft into its claim as far as its workings have penetrated, and into the ore body in which it was mining at the time this action was brought.

The witnesses on behalf of the defendants, with two exceptions, were entirely disinterested, and were all men of great experience and more than common intelligence.

On the other hand, the plaintiff's witnesses were all persons in its employ, as miners or otherwise.

After a thorough trial of the case upon its merits, the court held the case under advisement for about five months, and then rendered findings and judgment in favor of the defendant.

Before calling attention to the evidence adduced on behalf of the defendant, it may be well to refer to some of the legal principles which govern the case and some of the authorities which must guide us in arriving at a conclusion as to the rights of the respective parties.

To constitute a fissure vein, its dimensions are of no consequence; neither is its regularity or irregularity, its richness or its barrenness. It may be wide or narrow, or wide in some places and diminishing to almost imperceptible dimensions in others. It may be rich in places and very poor in others.

This has been repeatedly judicially determined.

In the case of *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 308, Judge Sawyer said: "A vein or lode, authorized to be located, is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute.

"It may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out into extensive ore bodies. So also in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode."

He affirms the same thing in identical language in the

Jupiter Mining Co. v. Bodie Con. M. Co., 7 Saw. 107; S. C., Copp's U. S. Min. Lands, 2d ed., 381-388. See also *Stevens v. Williams*, 1 McCrary, 488; *Foot v. National M. Co.*, 2 Mont. 402.

All scientific authority is to the same effect.

"Veins are aggregations of mineral matter in fissures of rock. Lodes are, therefore, aggregations of mineral matter containing ores in fissures. As all veins are aggregations of mineral matter in fissures, their form necessarily approaches the tabular. Veins are never really tabular, as they not only thin out gradually towards their ends, but very frequently exhibit irregularities in their whole extent which are caused by unequal breadth and deviations from the plane of their course. The breadth or size of veins is very variable—some are not thicker than a sheet of paper, while others are several hundred feet thick. Under these circumstances it is impossible to give a mean breadth for lodes; although, as a rule, most paying lodes average between six inches and five feet." Von Cotta on Ore Deposits, Prime's translation, 26.

"By vein, as a geological and mining term in general, is understood an aggregation of mineral matter of indefinite length and breadth, and comparatively small thickness, differing in character from and posterior in formation to the rocks which inclose it. A true vein may be defined as a fissure in the solid crust of the earth, of indefinite length or depth, which has been filled, more or less perfectly, with mineral substance; or, in other words, an aggregation of mineral matter, accompanied by metalliferous ores, within a crevice or fissure, which had its origin in some deep-seated cause, and may be presumed to extend for an indefinite distance downward." Whitney's *Metallic Wealth of the United States*, 49; see also page 54.

"Veins are narrow plates of rock intersecting other rocks. They are the fillings of cracks or fissures; and as these cracks or fissures may either extend through the earth's crust and divide it for any distance, or reach down only to a limited depth, or be confined to a single stratum, so veins are exceedingly various in extent. They may be no thicker than paper, or they may be scores of rods in width, like the great fissures opened in times to the earth's inner regions.

by subterranean agency." Dana's Manual of Geology, 108, 109.

"Mineral veins vary in thickness from merely an inch or less up to many fathoms." Prof. Geike, 10 Ency. Brit., 9th ed., 317.

One of the characteristics of a fissure vein is that it cuts all the formations or different strata of the earth's crust.

Von Cotta says that true veins "traverse a rock or formation independently of its texture and position, and not parallel to its stratification or foliation." Von Cotta on Ore Deposits, 28. See also Whitney's *Metallic Wealth*, 49.

"The most essential definition of a true fissure vein is satisfied when a deposit is shown to break indiscriminately across one stratum after another of non-homogeneous rock; and compared with this requirement, all other signs of fissuring have justly been held to be of only secondary importance." Church on the Comstock Lode, 168.

So it is held that when a vein of this character crosses the side lines of a claim they become end lines, and must be projected vertically, so that the side lines in such case mark the limit to which the locator may explore. *Mining Co. v. Tarbett*, 98 U. S. 463; S. C., Copp's Min. Lands, 347-350; *Stevens v. Williams*, 1 McCrary, 490.

The *Eureka Case*, 4 Saw. 302, bears no resemblance to the case at bar. Since the decision in that case, many efforts have been made, under color of the opinion therein, to locate or claim large belts or zones of rock in mining regions as lodes; and the plaintiff claims that its alleged limestone lode is one like that in the *Eureka Case*. In that case the court gave to the term lode its widest possible signification, but still limited it to mineralized rock. *Id.* 312.

Mr. Justice Field, in his opinion, was very careful to show the mineralized character of the *Eureka* lode. After describing the boundaries he says (p. 312): "The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony

of the men of science, to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed, and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part operated upon the whole at the same time. * * * The broken, crushed, and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestones in the vicinity. * * * Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinion of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would, therefore, naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter—metal-bearing rock."

His conclusion is based upon the testimony of experts in the case, one of whom (Dr. Hunt) he quotes as follows: "My conclusion is this, that this whole mass of rock is impregnated with ore."

There is no resemblance whatever between the limestone found in the Eureka and that found in the Good Enough. The former case presents a great crack in the earth's crust, the walls of which are separated at one point by a bare seam, and, diverging, are several hundred feet apart at another point. While these walls diverge upon the surface, they converge as they descend into the earth, so that at no great depth they must come together.

The underlying formation or foot wall is quartzite, and the superior rock, or hanging wall, is shale—both sedimentary rocks. Between the two is the limestone, also a sedimentary rock. But from its position it is evident that its

deposition and formation were elsewhere than between the rocks now inclosing it. It is found to be broken, crushed, disintegrated, and fissured in all directions, and all traces of stratification destroyed, except in a few insignificant places.

It is manifest that whatever force of nature crushed and broke up this limestone, precipitated it into this great crack, where it is now found. This is apparent when we consider that if it had been laid down between the shale and quartzite, it would have been conformable thereto, and would have occupied a space between the two of comparatively uniform depth or thickness.

The limestone found in the Good Enough differs in every respect from that found in the Eureka.

It is conceded that the limestone in question in the Good Enough is a stratified rock; that it is conformable to the hanging and foot walls; and that it has an average thickness of about eighty feet, from which it does not greatly vary. No ore has been found in it west of the Way Up fissure (excepting where the forty-foot flat ore body extends for a few feet), but the whole is one unbroken mass of barren rock, extending for hundreds of feet. So, also, is it everywhere, except where it is intersected by the Way Up fissure, and the flat ore bodies connected with it, which occupy but small space as compared to the mass. Neither is the limestone impregnated with ore, nor is there any such diffusion of mineral therein, "as to justify giving to it the general designation of mineralized matter, or metal-bearing rock," as in the Eureka case. Neither has it any "specific, individual character, by which it can be identified and separated from all other limestone in the vicinity," but, on the contrary, it differs in no respect from large bodies of limestone in the immediate vicinity, one of which is separated from it only by the shale, called by the plaintiff its hanging wall.

It is admitted to be a stratum of sedimentary rock, lying between two other sedimentary rocks, all of which were originally laid down in the bed of the ocean, and subsequently tilted up by some great dynamic force of nature.

It is impossible to conceive of this as a mineral vein or lode. It certainly is not one within the meaning of the act of congress, or the understanding of geologists or miners;

and none but those in the employ of the plaintiff ever had the hardihood to so characterize it.

Mr. Justice Field arrived at his construction of the meaning of the term lode as used in the act of congress by assuming that "cinnabar is not found in any fissure of the earth's crust, or in any lode as defined by geologists;" and as the act authorizes the location of any "vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper," he says that "any definition of lode, as there used, which does not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver." How he could have fallen into the error of supposing that cinnabar is not found in veins, fissures, or lodes, is unaccountable.

Von Cotta describes a large number of lodes of the ores of mercury (cinnabar) found in the Saarbrück coal basins, and occurring in veins and fissures. *Treatise on Ore Deposits*, Prime's translation, c. 6, p. 200. Cinnabar is also found in veins at Almaden, in Estremadura. *Id.* 399, 400.

Professor Blake testified in this case to the occurrence of cinnabar in lodes. He said: "I have never seen any cinnabar mines that were not lodes. The New Almaden I consider a lode. It is irregular, but the cinnabar is in a vein, traversing strata which the French call *filons*. So also at Coulterville, California, there is a vein of cinnabar in quartz."

Therefore, the supposed necessity of enlarging the meaning of the term "lode" to embrace cinnabar rests upon a false premise, and requires a return to the canons of construction, that words in common use are to be taken in their natural, plain, obvious, and ordinary signification, and technical words are to be taken in a technical sense unless a contrary intention appears clearly from the context.

Considered in its plain, obvious, or technical meaning, the term "lode" will give rise to no disputes among miners, and will carry out the evident intent of congress, to use it in the same sense as the word "vein" is used, the terms being everywhere convertible.

A belt or zone of metalliferous rock, even where such might be designated a lode, can not be permitted to swallow up true fissure-veins found within it.

It is so held in the "Callison case." The Callison vein was found within a metalliferous belt or zone, which the Mount Diablo Company claimed to be one lode, and of which they asserted ownership. Their claim was based upon the theory supposed to be established in the Eureka case, and they called to their assistance Mr. Keyes, who seems to be the author of the "one-ledge" theory, and can always be found ready to support it, or at least advocate it, as he did in this case. The case was tried before Judges Sawyer and Hillyer, who both sat in the Eureka case, and concurred in the opinion therein. And commenting upon that opinion they said: "It was never intended in that case to hold that every metalliferous zone of country to which boundaries could be found, must be regarded as one lode, for this would be to reduce all mining districts to one lode."

Coming to the vein in controversy in the case, the court said:

"Having such a zone or district, when we find within it fissures like that opened by the Callison, filled with ore, we think we must regard them as veins or lodes. For while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone can not be permitted to swallow up, under the name of lode, true fissure-veins found within it." *Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 439.

All metalliferous veins in the Tombstone mining district have a strike parallel to that of the Way Up lode.

The evidence in the record upon this point is uncontradicted.

The parallelism of such veins is usual in mining districts, thus making it probable that there is no vein or lode trending in the direction claimed by the appellant.

Von Cotta says: "As a rule, lodes occur associated together, so that when one lode has been discovered, there is a great probability that others of a similar kind will be found in the neighborhood; they are generally arranged in groups, tolerably parallel to one another." *Treatise on Ore Deposits*, Prime's translation, p. 33. "In every district where metalliferous veins occur, there are generally quite a number of them together, which often seem to form groups, in which they are parallel to one another." *Id.*, p. 28.

Dana says: "In studying veins, besides noting the extent of their mineral character and structure, it is important to ascertain their strike and angle of dip. There is generally an approximate unity of strike in a given region, and frequently the direction is parallel to the principal line of elevation in the region." *Manual of Geology*, p. 113; see also *Id.*, 774; *Whitney's Metallic Wealth of U. S.*, 58.

There is no apex of any lode or vein found within the exterior boundary lines of the plaintiff's Good Enough claim (except that of the cross fissure—the Way Up lode); hence, plaintiff has no right to follow any ore body beyond its side lines. *U. S. R. S.*, sec. 2322; *Stevens v. Williams*, 1 *McCrary*, 482; *Iron Mine v. Loella Mine*, 2 *Id.* 124; *Wade*, secs. 35, 36.

The cases cited hold that the top or apex of a lode is the end or edge, or terminal point of the lode nearest the surface of the earth, "it being essential," says Mr. Justice Miller, "to such top or apex that there be no vein continuing beyond it." If the highest point is merely a swell in the mineral matter, it is not an apex in the meaning of the statute. If it be continuous from one side to the other of the location—that is to say, if, coming in at one side, it passes unbroken to the other—it can not be followed beyond the lines of its location. "And no location can be made on the middle part of a lode, or otherwise, than at the top and apex, which will enable the locator to go beyond his line."

We have traced a well-defined fissure vein, from the Tough Nut, across the Good Enough, into the Way Up, showing a vertical structure the whole distance, and carrying ore nearly the whole of that distance from the surface to the deepest workings along its course. We have shown that it cuts indiscriminately across one stratum after another of non-homogeneous rock—shale, lime, and quartzites, and descends into the earth as far as any work upon it has penetrated, and is still found going down.

Against the evidence establishing these facts the plaintiff produced nothing. None of its witnesses, not even its expert and superintendent, denied the existence of this fissure vein. The testimony of the rocks confronted them, and they could not hope to impeach this silent and immutable evidence of nature, which admits no contradiction.

But with desperate tenacity the plaintiff clings to the theory that the presence of flat ore bodies running perpendicularly to the fissure may be accepted by some as evidence of a lode having a general direction approximately parallel to the side lines of its claim. But all the evidence shows, and the plaintiff could not deny, that these flat ore bodies were connected with the fissure, and descend as they depart from it; that they were formed in all probability by a flow of thermal waters, which ascended or descended through the fissure, bearing carbonic acid and mineral matter, eating out the soluble rock and depositing the ore bodies. Thus were the plaintiff's blanket and peapod deposits formed from the fissure, belong to it, and are a part of it, it being the only vein in the premises.

The truth of this is rendered absolutely certain by the facts in evidence; that the walls of the fissure show movement by elevation or depression, so that the stratification, which is broken through by the fissure, does not now lie in a corresponding position on either side—the lime, for instance, on one side of the fissure being several feet above the corresponding lime of the other wall, and perhaps opposed by quartzite; while the ore bodies in the fissure, the flat ore bodies lying across it, and those connected with it are unbroken: demonstrating that they were all created subsequently to the fissure, and their origin must be referred thereto.

The plaintiff's other theory of the existence of a great limestone lode extending from the shale above to the quartzite below, is shown by the evidence already quoted to be utterly without foundation.

But the demonstration of its falsity is complete, by the fact that plaintiff's incline No. 1 runs under a lower body of shale than its incline No. 2 does. In order to fully appreciate the force of the evidence upon this point, it is necessary to read the testimony in connection with the surface maps, which show that the head of incline No. 1 is almost due south of the head of incline No. 2; so that the prolongation of a line drawn through the heads of the two inclines would intersect the side lines of plaintiff's claim. The inclines are about one hundred feet apart, so that if the roof of incline No. 1 is the same body of shale beneath which

No. 2 descends, the strike of the underlying limestone must be nearly at right angles with the plaintiff's side lines. Plaintiff's experts saw the difficulty of reconciling these facts with their theories, and so suggested that there must be a fault there; but it is plain the fault is in their theories, because both Professor Blake and Mr. Stretch are positive that there is one or more bodies of lime lying between the shales, beneath which the inclines descend. And they say such lime is plainly visible upon the surface.

Thus falls the great "one-ledge" theory so tenderly brought forth by the plaintiff.

We contend that upon all the issues the evidence is overwhelmingly in favor of defendant. But upon motion for a new trial, it is only necessary for the successful party to show a substantial conflict of evidence, to entitle him to sustain his judgment. *Visher v. Webster*, 13 Cal. 58; *Phillipps v. Blasdel*, 8 Nev. 66; *Treadway v. Wilder*, 9 Id. 67.

And upon appeal the appellate court will never reverse a judgment if there is any substantial evidence to sustain it, unless there be errors of law upon which it can be reversed.

• *Covington v. Becker*, 5 Nev. 281; *State v. Yellow Jacket M. Co.*, Id. 415, and cases cited; *Lewis v. Wilcox*, 6 Id. 215; *Kile v. Tubbs*, 32 Cal. 332; *Lubeck v. Bullock*, 24 Id. 338; *McCoy v. Bateman*, 8 Nev. 126.

Upon the question of newly discovered evidence, the plaintiff has made no case by its affidavits. They present nothing but cumulative evidence at best.

In the second place, the evidence offered by them is utterly immaterial. The principal fact proposed to be established by them is the continuation of the blanket ore bodies to a greater distance than was shown at the trial. But this fact in no way disproves our theory, that there is a fissure vein running across the side lines of the Good Enough and into the Way Up, nor does it have any tendency to establish the plaintiff's theory, because the extent of these ore bodies in no way disproves the fact of their having been formed from the fissure and made a part of it.

Newly discovered evidence, on motion for new trial, is always looked upon with jealousy. *United States v. Smith*, 1 Saw. 277, 290, 291; *Howard v. Winters*, 3 Nev. 539.

Newly discovered evidence must be material; must show

it could not have been produced at the first trial, and must not be cumulative. *Howard v. Winters*, 3 Nev. 539; *Armstrong v. Davis*, 41 Cal. 499; *People v. McDonell*, 47 Id. 138; *Reed v. Clark*, Id. 204.

The newly discovered evidence must appear to be incontestable. *Buckelew v. Chipman*, 5 Cal. 400.

But new developments in a mine are in no sense newly discovered evidence. *Tiernan v. Trewick*, 2 Utah, 397.

By Court, PINNEY, J.:

This case comes up on appeal from judgment and order overruling a motion for a new trial. The case was tried by the court without a jury, and the trial judge filed findings of fact and conclusions of law, and a judgment was entered in accordance therewith in favor of defendant. Plaintiff moved for a new trial, but before the motion was disposed of, the trial judge retired from the bench and another judge was appointed in his stead. When the motion for a new trial came up for hearing, it was overruled *pro forma*. The court declining to hear the motion on its merits, not having heard the evidence at the trial of the cause, appellant's counsel now insist this court should, under the circumstances, not be governed in its decision on this point by the general rule that an appellate court will not disturb the verdict of a jury or findings of fact by the trial court where there is a conflict of evidence. They insist that the case should be now heard on appeal, as if it were on motion for a new trial in the district court. In the consideration of the case we have borne in mind the peculiar circumstances surrounding it. Still it must also be borne in mind that every presumption is in favor of the correctness of the judgment, and that neither appellate nor trial court will disturb the verdict of a jury or the findings of fact by the court, where there is substantial evidence to sustain such verdict or findings, unless errors of law have occurred requiring a reversal. *Covington v. Becker*, 5 Nev. 281; *Kile v. Tubbs*, 32 Cal. 332; *Miller v. Balthasser*, 78 Ill. 302.

One of the main reasons for upholding the verdicts of juries and the findings of fact of a court, where there is no indication of improper motives influencing them in coming to a conclusion, and where no errors of law occur, is that

they have heard the testimony, have had an opportunity of observing the conduct and bias of the witnesses, their intelligence, etc., and are, therefore, better enabled to arrive at the true facts of the case than an appellate court possibly can be. Having in mind the rule, upon an examination of the entire record, if it shall be found that there is no substantial evidence to sustain the findings of fact, or if there be found a material error in the conclusions of law of the court below, it is the duty of this tribunal to reverse or modify the judgment appealed from, otherwise the judgment must be affirmed. The questions, then, for our consideration, are: 1. Should the case be reversed on questions of fact or findings of the trial court? 2. Is there error of law in his conclusion and judgment? The complaint alleges the incorporation of plaintiff and defendant; that plaintiff company was the owner and in possession of the Good Enough mining claim and lode in Tombstone mining district, Cochise county, Arizona, which is therein described. That within said claim there is a valuable vein, lode, lead, or ledge, and mineral deposit of rock in place, bearing silver and other valuable metals, having its top or apex within the exterior boundaries of said claim and dipping in a north-easterly direction at an angle of twenty to twenty-four degrees from the horizontal, passing beyond the side line of the Good Enough claim in that direction, and entering the adjoining land. That on or about March 1, 1831, defendants ousted the plaintiffs from that portion of its vein or lode which had been opened and developed by defendants beyond the north-east side line of the Good Enough claim and beneath the surface of the Way Up mining claim, which at that point adjoins the Good Enough claim. Then follow allegations of value of ore and occupation. The other causes of action are substantially the same, with variations as to value of ore mined, etc., followed by a prayer for an injunction and for recovery of said land and premises and for damages.

The claim for damages was dismissed without prejudice, and the question of right of possession alone tried. The defendant's answer specifically denied the material issuable facts stated in the complaint, and for defense alleges that the Way Up Company is the owner of, and was in the pos-

session, and entitled to the possession of the Way Up mining claim, and of all veins, mineral deposits, etc., the apexes of which were embraced in its exterior limits. Alleges that the ore body developed within the Way Up claim by defendant is a vein or ledge having its apex within the Way Up claim, and prays that defendant may go hence, and for costs. It is not a cross-bill, but set up as matter of defense, and not as a counterclaim, which seems necessary under this practice. *Brannan v. Paly*, 58 Cal. 330. An injunction was granted at the commencement of the action, which was dissolved on the rendition of the judgment. On the issue thus formed the case was tried in the court below, the judge filed his findings of fact and conclusions of law, and judgment was entered accordingly. The findings are, in substance: That plaintiff and defendant were each incorporated, and the respective owners and in possession of the Good Enough and Way Up mining claims; that there is no vein or ledge running through the Good Enough claim parallel with its side lines, but that the only vein, lode, etc., shown by the evidence runs across the said Good Enough claim, and crosses its side lines, and enters the Way Up claim on its strike; and the ore raised and taken out by defendant company was from said vein, lode, etc., extending on its strike or course as aforesaid across said Good Enough claim in a north-easterly direction beyond its side lines, and into defendant's Way Up claim; that plaintiff had not, within the boundaries of its said claim, any mineralized ledge, lode, belt, zone, etc., of rock dipping beyond its side lines into the Way Up claim as alleged and described by plaintiff; that all ore shown by the evidence to have been found within said Good Enough claim and the extended side lines of the Way Up claim came from, was connected with, and was a part of said vein, lode, or ledge, which upon its strike in a north-easterly direction entered the Way Up claim; that there is no vein, ledge, lode, or mineralized deposit having its apex within the exterior boundaries of plaintiff's claim, except that which crosses its side lines and enters the Way Up claim. The sixth and last finding is, that there is no vein, lode, ledge, or mineralized deposit having its apex within the exterior boundaries of plaintiff's claim, dipping beyond the side lines of plaintiff's said claim into the Way

Up claim; and as conclusions of law the trial judge found that the defendant was the owner of the Way Up mining claim, with all its veins, etc., and was entitled to recover and work the same, and that plaintiff is entitled to take nothing by the action, and that the injunction and restraining order heretofore granted should be dissolved, and for costs.

Upon these findings judgment was entered, which is in substance a repetition of the findings and conclusions of law.

The assignments of error on the part of appellant are full and elaborate. They cover every point in the findings, conclusions of law, and in the judgment. The argument is ingenious and exceptionally able. Under our view of the case, only one finding of fact was necessary, and that is embraced in the sixth finding. The material fact, at last, is, Did plaintiff's claim have a vein, lead, lode, or mineral deposit whose apex was located within the exterior boundaries of the Good Enough mining claim, and which dipped into the Way Up claim? This is the ultimate fact to be found, and the one upon which the judgment must stand or fall. The sixth finding is a complete answer. That plaintiff should take nothing by this action, and the injunction and restraining order granted should be dissolved, was all that was necessary, and disposes of the case. As shown above, the answer does not contain a cross-bill, and it follows that the only proper judgment that could be rendered is that plaintiff take nothing by its action, that the injunction be dissolved, and costs awarded to defendant. But plaintiff contends that the evidence is insufficient to sustain the findings of fact, and that the court erred in the conclusions of law, and that the judgment is unsupported by the findings. In other words, that the judgment is contrary to the law and the evidence. An examination of the evidence shows that the Good Enough claim was located in a north-westerly and south-easterly direction adjoining this claim. On its north-easterly side line lies the Way Up. The latter extends lengthwise in a north-easterly and south-westerly direction, so that the south-west end line of the Way Up abuts against the north-east side line of the Good Enough. Plaintiff claims that the Good Enough is located along a vein or ledge of mineral-bearing rock in place, which extends through it substantially parallel with its side lines, and that

this vein or ledge dips in a north-easterly direction, passing its side lines into the Way Up; that defendant sunk a shaft near the line dividing the two claims, encountering plaintiff's vein on its dip, and were extracting the ore therefrom.

Defendant, on the other hand, insists that the Way Up claim is located along a fissure vein extending in a north-easterly and south-westerly direction, and substantially parallel with its side lines; that its shaft is sunk on this vein, and that the ore being taken out by it is from this vein. That this vein extends through the Good Enough claim in a direction substantially at right angles to the side line to Good Enough. And that the ore bodies which the plaintiff claims to be on its vein, and which it has a right to follow on its dip into the Way Up, form part of the Way Up vein or lode. Section 2322 of the revised statutes of the United States gives the owner of a mining claim the right to follow his vein or lode on its dip only when such vein or lode dips (that is, departs from a perpendicular position) substantially at right angles with the strike of the vein or lode, and does not allow him to follow the vein outside of his claim on the course or strike of the vein in any case. If the vein crosses the side lines on its strike, such side lines become the end lines, and terminate the owner's right to follow the vein in that direction. *Mining Co. v. Tarbet*, 8 Otto, 463. A large number of witnesses for defendant testify to the existence of a fissure vein in the Way Up claim. They swear that they examined, saw, and traced it, and found ore in it. That it passes from the Way Up claim, enters into the Good Enough, and crosses it. The judge who tried the case believed that. And it is not for this court to say that his findings are incorrect. The rule is too well established on this point for us to disturb it now. But plaintiff's counsel contend that, conceding that the Way Up fissure vein exists as testified by defendant's witnesses, still the evidence establishes the existence of the Good Enough vein, lode, ledge, or deposit. That this Good Enough claim lode extends through the Good Enough claim parallel to its side lines, and dips into the Way Up. That it has an average width of some sixty feet, and that plaintiff has the right, under section 2336 of the United States revised statutes, to take all ore at the intersection of the

two veins, the Good Enough being the older location. If, however, the sixth finding of fact is sustained by substantial evidence (and we think it is), then this point is not well taken. There is much evidence in the record which goes to show that the various ore bodies in the Good Enough claim, opposite the Way Up claim, are connected with the Way Up fissure vein, and flow from it, and although constituting flat ore bodies lying in strata of limestone, and at considerable distance from the fissure, yet are attached to and form a part of the Way Up vein. Ore bodies thus formed off from and connected with a fissure vein do not form a separate vein, lode, ledge, or mineral deposit. This evidence sustains the sixth finding of fact. It notes the ultimate fact at issue, and it was not necessary to find the probative facts which establish this ultimate fact. *Mining Co. v. Taylor*, 100 U. S. 37. The second conclusion of law, to the effect that plaintiff is entitled to take nothing by this action, and that the injunction and restraining order be dissolved, properly follows.

The point made by plaintiff's counsel, that the findings are insufficient in form and are mere conclusions of law, we think not well taken. The true test of the sufficiency of the findings is this, Would they answer if presented by a jury in the form of a special verdict? Tested by this rule, we think them sufficient to sustain the judgment: *Miller v. Steen*, 30 Cal. 402. From the fact, however, that defendant's answer does not contain a cross bill entitling it to affirmative relief, the judgment will be modified to the extent that plaintiff take nothing by its action, and that defendant go hence without day, and recover of plaintiff all costs and disbursements in this behalf incurred. In other respects, the judgment and orders appealed from will be affirmed, and it is so ordered.

FRENCH, C. J.:

I concur in the foregoing decision of Mr. Justice Pinney that the judgment as modified and the order appealed from be affirmed.

MARIA LOPEZ DE LOPEZ, ADM'X, RESPONDENT, v.
CENTRAL ARIZONA MINING CO., APPELLANT.

DEFENDANT IN DEMURRING TO COMPLAINT FOR FAILURE TO STATE FACTS SUFFICIENT to constitute a cause of action, and specifying in his demurrer certain grounds of insufficiency, can only rely upon the defects specified. It is otherwise if the demurrer is general, and without specification.

ABSENCE OF FAULT ON PART OF PLAINTIFF, in an action to recover for personal injuries caused by the defendant's negligence, need not be averred or proved by him.

PLAINTIFF IN SUCH ACTION CAN NOT RECOVER IF HIS OWN WANT OF CARE or negligence in any degree contributed to the result complained of. It is no defense, however, if the plaintiff's act might have contributed, or did contribute, to the injury. It must have been by his fault, not merely by his act.

OWNER OF MINE WHO WORKS IT IN DANGEROUS BUT ONLY PRACTICABLE MANNER is not liable for injuries to an employee, caused by a fellow-servant in the course of the employment, if such employee had knowledge of the danger, unless the injury complained of resulted from the wrongful act, neglect, or default of the owner.

APPEAL from the district court of the second judicial district, county of Maricopa. The appeal is from a judgment in favor of the plaintiff, in an action to recover for the death of her husband by reason of the defendant's negligence, and from an order denying the defendant a new trial. The further facts appear in the opinion.

Tweed & Hancock and Caleb Dorsey, for the appellant.

On the twenty-first day of June, A. D. 1881, and for a long time previous, Florence Lopez was, and had been, in the employ of the defendant corporation, as a miner in the Vulture mine, and had worked in said mine for seven years. On the twenty-first day of June, A. D. 1881, he was killed by some rock falling on him while he was at work in the mine. His work was to remove the rock after it had been blasted down from above by other miners. The place in which he worked was at the bottom of an open cut, which was about a hundred and fifty feet wide on the top, and about fifty or sixty feet deep. The rock was blasted down from the side of the open cut near the surface of the ground, and Florence Lopez was at work in the bottom of the open cut, removing the rock through a chute to a lower tunnel, as it was blasted down by other miners from above. It was the

custom of the mine for the blaster to give notice to the men below, to get out of the way just before he fired off a blast, and to stay out of the way until all the loose rock was pried down which was made loose by the blast. Such notice was given at the time Lopez was killed.

Florence Lopez knew that it was dangerous to be there when the loose rock had not been pried down. In fact he claimed to believe and know that the place was a dangerous place to work in under any circumstances, even when no blasting was going on. He had been working in the mine for six or seven years, and had every opportunity to know if it was a dangerous place to work in; and the rock which fell and caused his death was in full view of the place where he was at work, and could be easily seen by him.

The case was tried by a jury, which rendered a verdict of three thousand dollars for plaintiff. Defendant made a motion for a new trial, which was overruled; and defendant appealed to this court from the judgment and order overruling defendant's motion for a new trial.

1. The court below erred in allowing any evidence to be given under the complaint on the part of the plaintiff over the objection of defendant's attorneys. The complaint had been demurred to on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court. By answering the complaint the defendant did not waive its right to object to the complaint on the grounds of the jurisdiction of the court, nor that the complaint does not state facts sufficient to constitute a cause of action. These objections can be made at any time, and at any stage of the proceedings.

The main question then is, Does the complaint state facts sufficient to constitute a cause of action? If it does not, then it is clear that the complaint is a nullity, and no evidence should have been given, on the part of the plaintiff, over the objections of defendant's attorneys. We contend that the complaint does not state facts sufficient to constitute a cause of action, and that the evidence should not have been allowed.

The complaint states that for a long time prior to the death of Lopez, the defendant had endangered the lives of the miners working in its mine by not having proper and

sufficient supports and pillars in the mine to prevent its tunnels and excavations from caving in. It would appear from this allegation in the complaint that the place was dangerous to work in, for the want of pillars and supports, and that the danger was apparent to Lopez, and to every miner working in the mine; for it had been in that condition for a long time previous to the death of Lopez. Under such a statement of facts the law presumes that Lopez was guilty of negligence, or he would not have worked there; and, in order to rebut this presumption, it makes it incumbent upon him also to state in his complaint that the dangerous condition of the mine was not known to him, and could not with reasonable care and diligence have been discovered by him; and also to state that he was free from negligence, and acted with ordinary prudence in avoiding the danger. No such averments are in the complaint, and without them the complaint does not state facts sufficient to constitute a cause of action.

Where the negligence of the plaintiff caused or contributed to the injury received, the defendant is not liable, as will be seen from the authorities hereafter cited.

The courts in various states of the Union have been very much divided on the subject whether the plaintiff should state in his complaint that he acted with due and ordinary care to avoid the danger, or that the danger was unknown to him, or whether such matters are matters of defense, and should be set up in the defendant's answer. It has been decided and settled in Massachusetts, Maine, Iowa, Illinois, Connecticut, Mississippi, Michigan, and Indiana, that in order to make out a *prima facie* case, the plaintiff must not only show negligence on the part of defendant, but he must also show that he himself was in the exercise of due care in respect to the occurrence from which the injury arose. 2 Thompson on Negligence, 1176, 1178, and notes, where all the cases are collated from each of the states above named. In Pennsylvania, Missouri, Wisconsin, Kentucky, Maryland, Alabama, Kansas, Minnesota, and New Jersey, it has been decided that the negligence of the plaintiff contributing to the injury complained of is a matter of defense, and that ordinarily the burden of proof is on the defendant. (The same authorities last above cited.)

The authorities on this subject are so numerous and apparently so conflicting, that I have deemed it unnecessary to cite them in detail and comment upon each case separately, but will content myself with referring the court to the authors who have collated all of said authorities, and who have stated what ought to be the rule which should be followed in such cases. In 2 Thompson on Negligence, 1178, the author says: "On an examination of the authorities it will be found that where the courts decided that the burden of proof is on the plaintiff to show due care on his part, they have also held that this proof need not be direct, but may be inferred from the circumstances attending the occurrences causing the injury; and in those states where the doctrine obtains that contributory negligence on the part of the plaintiff is a matter of defense, if his case raises an inference of negligence on his part, he must in order to make out a *prima facie* case prove that he was guilty of no negligence."

Judge Lyons, in a case decided by the supreme court of Wisconsin, has very well stated the rule: "We hold, that in the absence of any evidence tending to show that the plaintiff is chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he is free from such negligence, and the burden is upon the defendant to prove such contributory fault, if the same is relied upon as a defense. The rule here adopted does not apply to a case in which the proofs on the part of the plaintiff show or tend to show his contributory negligence. If such negligence conclusively appears, the court will nonsuit the plaintiff, or order the jury to find for the defendant." Shearman & Redfield on Negligence, sec. 43 and note, is to the same effect. He approvingly quotes the rule laid down by Judge Denio, in *Johnson v. Hudson River Railroad Company*, 20 N. Y. 65, which is as follows: "I am of opinion that it is not a rule of law of universal application, that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is

run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of defendant's conduct would create so strong a probability that the injury happened through his fault, that no other evidence would be required; but if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care. The obligation to give such evidence would be greater or less, as the impediment was more or less dangerous."

This rule, as stated by the New York court, was approved by the supreme court of the United States in the case of *Railroad Company v. Gludmon*, 15 Wall. 406; see also Shearman & Redfield on Negligence, secs. 44, 45. In section 45 the author says: "If it appears that any defects in the things or faults in the persons employed by plaintiff contributed to his injury, the burden is clearly upon him to show not only that he did not know or suppose that such defects or faults existed, but also that he was in no fault for not knowing of their existence."

It is plain, from the foregoing authorities, that the authors above cited, from the authorities collated by them, from which they have adduced the rule above stated, have divided all the cases of negligence into two classes; in one of which it is absolutely necessary for the plaintiff, not only to prove the negligence of the defendant, but also to prove that he himself acted with due care and prudence. This is the class of cases where the proof on the part of the plaintiff of the negligence of the defendant justifies an inference that the plaintiff was also negligent. The other class is where the evidence on the part of the plaintiff does not justify an inference that the plaintiff himself was negligent. In such cases the plaintiff need not prove that he acted with due caution and prudence. Those are matters of defense, which must be set up and proved by the defendant.

The case at bar comes under the first class, and it is

necessary for the plaintiff to prove that he acted with due care and prudence. If it is necessary, then, to prove these facts, they must be stated in the complaint, or the complaint does not state facts sufficient to constitute a cause of action. The facts stated in the complaint do warrant an inference that the plaintiff himself was negligent. The averment in the complaint is as follows: "That upon the said twenty-first day of June, A. D. 1881, and for a long period of time prior thereto, said defendant, in working and excavating upon said Vulture mine, wrongfully and carelessly neglected to keep in good and safe condition and repair, by building and maintaining in its tunnels, shafts, and excavations, proper and sufficient supports and pillars to prevent their tunnels and excavations from caving in, thereby endangering the lives of the servants and employees of said defendant, laboring in said mine."

The allegations of the complaint, if true, warrant the inference that the dangerous condition of the mine was apparent and could be plainly seen, and that plaintiff did see and know its dangerous condition; and that the complaint, under the facts stated, would not state a cause of action unless it also stated that the plaintiff was ignorant of the dangerous condition, and could not have discovered it with reasonable care and diligence. For these reasons we contend that the complaint is a nullity, and that the court erred in permitting any evidence to be introduced under it.

2. The court erred in refusing to grant defendant's motion for a nonsuit.

(1) The evidence shows that the plaintiff considered the mine dangerous to work in, and that its dangerous condition was plainly to be seen by him; and that he well knew its condition; and if, after knowing its condition, he continued to work there, he himself assumed all the risk from the dangerous condition of the mine, and can not recover of the defendant damages for any injuries which he may have received. *McGlynn v. Brodie*, 31 Cal. 376; *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Loonam v. Brockway*, 3 Robt. 78; S. C., 28 How. Pr. 472; *Illinois Central v. Jewell*, 46 Ill. 99; *Ship Anglo-Norman*, 4 Saw. 185; *Kielley v. The Belcher Silver Min. Co.*, 3 Id. 500; *Shearman & Redfield on Neg.*, sec. 94, and notes.

(2) The evidence to show that he did know the condition of the mine was introduced by the plaintiff himself, and is wholly uncontradicted.

Calisto Esquibel testified as follows: "I was working right there with him. I considered that a dangerous place about a month before Lopez was killed. Lopez so considered it. Lopez often said it was a dangerous place."

Teófilo Hernandez testified as follows: "I knew the place in this mine where Lopez was killed. I knew of two men working there a few days before his death. I know that these men quit working there on account of its being a dangerous place. Lopez continued to work there after these men left."

Under that evidence, it is plain, under the authorities above cited, that Lopez could not recover, as he continued to work with full knowledge of the dangerous condition of the mine. Upon the plaintiff's own evidence, then, it was plain, that as a question of law, the plaintiff could not recover, and the court should have granted the nonsuit.

3. The evidence is plainly insufficient to sustain the verdict, and the verdict is against law. In addition to the evidence given by the plaintiff as above stated, it was shown by the defendant's evidence, that the mode of working the mine was as follows: "The mine was worked from the top down, by making an open cut by the side of the vein of quartz, and after the open cut was made a certain depth, the quartz was blasted down from the top, and when it fell to the bottom of the cut it was removed by other miners; and it was impracticable to work the mine in any other way. It was also the custom, when the blasters were about to put off a blast, to give notice to the men working below, by crying out "fire," so that they could get out of the way of any danger, and they were also instructed to stay out of the way until the blast was fired off, and all the rock loosened by the blast had been pried down. The testimony further shows that notice was given by the blasters immediately before Lopez was killed, and that Lopez returned to the place where he was killed before the loose rock was pried down. The testimony also shows that the superintendent often warned Lopez against the danger of loose rock falling after a blast had been put off.

It is very clear, then, that the defendant, through its superintendent and foreman, had done their whole duty by informing Lopez of all the dangers that he was likely to incur by working in said mine, and he was fully instructed not to expose himself to such dangers. This being the case, the defendant was not guilty of negligence, and it is plain that the plaintiff came to his death by his own rashness and want of care in not staying out of the way, and in continuing to work in said mine after he had been informed of the dangers he would likely incur if he worked there. The court instructed the jury to this effect.

Under this evidence and the instructions of the court, the verdict is evidently against law, and the evidence is entirely insufficient to support the verdict, and the court below erred in not setting aside the verdict and judgment, and granting a new trial on this point alone.

It is evident from the evidence given in this case, and from the authorities above cited, that had Lopez not been killed he could not have sustained this action for damages, for the reason that there is no evidence of any negligence on the part of the defendant, and that if there was any negligence at all it was on the part of the blasters, who were co-servants with Lopez, engaged in the same common employment. The master is not responsible to a servant for injuries received by the negligence of a co-servant. Blasters and miners removing rock are co-servants engaged in the same common occupation. *Kielley v. The Belcher Silver Mining Co.*, 3 Saw. 500.

If Lopez could not have sustained this action for damages, it can not be sustained by his administratrix under chapter 54 of the compiled laws of Arizona.

The defendant moved to strike out the evidence of Maria Lopez as to the age of the deceased, on the ground that it was hearsay testimony which was overruled by the court. The witness testified that she had no other knowledge of the age of Lopez, except what she obtained from Lopez himself and his mother. This ruling was certainly erroneous, as it was entirely hearsay evidence.

The defendant's attorney moved to strike out the evidence of Mariana Lopez, as to the age of the deceased, on the ground that she herself kept no record of his birth, and

that her testimony as to his age was given wholly from her recollection. She further testified that there was a record of his birth and baptism at the church of San Miguel, where he was baptized. This record, being in existence, was better evidence of his birth than the evidence of his mother based upon mere recollection. That being the best evidence, it should have been produced, and it was error to introduce any secondary evidence, for the reason that it is a well-settled principle of law that the best evidence must always be produced. This is too familiar a principle to need any citation of authorities.

The court erred in permitting the plaintiff, against the objection of the defendant, to ask Ramon Garcia the following question: "A short time before the death of Lopez, do you know of any other accident or caving in of that same roof?" The objection to this question was, that it was entirely irrelevant, as it does not tend to prove any issue in this case. The court certainly erred in permitting the question.

The court erred in refusing the ninth charge asked by the defendant's counsel. The authorities cited above, on the point that the complaint does not state facts sufficient to constitute a cause of action, apply to this charge. The case at bar is one of those cases which falls within the class which require the plaintiff to prove that he did exercise care and prudence, and that unless he did so prove he was not entitled to recover. These cases are so numerous, and have been cited in this brief on the point referred to, that it is useless to cite them again. Under those authorities this charge is certainly law, and applicable to the facts in the case as proven, and should have been given.

The court erred in refusing to give the thirteenth charge asked by defendant's counsel. This charge should have been given. It is certainly law, and applicable to the facts of the case as proven. *Kielley v. The Belcher Silver Mining Co.*, 3 Saw. 500; *McDonald v. Hazeltine*, 53 Cal. 35; *Sowden v. Idaho Mining Co.*, 55 Id. 443; *Shearman & Redfield on Negligence*, sec. 90.

The court erred in giving the following charge asked by the plaintiff, and excepted to by the defendant: "But if a man does imprudently and incautiously go into a mine in

performing his ordinary labor under the direction of the company or party working the mine, and is killed or injured by accident while there, the party or company working the mine is responsible, unless the said company or party working the mine has used reasonable care and prudence to prevent and avert a danger known to them, and provided, that while there the injured person did nothing to immediately contribute to the injury." This charge is not law, even if it plainly expressed the idea of the attorney who drew it; but there is a confusion of ideas in it, and it is difficult to understand exactly what it means. The words "imprudently" and "incautiously" would seem to have no force or effect in this charge, if you are to construe them with the last two lines of the charge, which are as follows: "That while there the injured person did nothing to immediately contribute to the injury." It is impossible for a person to imprudently or incautiously go into a mine, unless there is some seen and known danger to excite his prudence and caution. If there was any seen or known danger from which he had reasonable grounds for apprehending any injury to himself, it was rashness and gross negligence on his part to have entered the mine; and if he did so enter and did nothing else, the mere entry of the mine under such circumstances would be the proximate cause of his death, even if he did nothing else, should he be killed while in the mine.

For these reasons we ask that the judgment of the court, and order overruling defendant's motion for a new trial, be reversed and that a new trial be granted.

Alsap & Baker and Cox & Campbell, for the respondent.

This action is by the personal representative of the deceased. For the sake of easy reference we reprint the statute under which the complaint was filed:

"Sec. 1. Whenever the death of a person shall be caused by the wrongful act, neglect, or default; and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an

action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person, provided that no moneys so recovered shall be applied in discharge of any debts or liabilities of the person so killed, nor pass into the hands of his executors or administrators as assets of his estate." Comp. Laws, 54.

The complaint charges that the death of the deceased was caused by the wrongful neglect of the appellant in failing to make proper supports and pillars in the excavations of the Vulture mine. The answer denies any negligence in that particular, and avers that deceased came to his death by reason of his own want of care and prudence. The following facts are not questioned in the pleadings of the appellant, and are to be taken *pro confesso*: 1. The appellant is a corporation, and owner of the Vulture mine; Lopez was killed in that mine June 21, 1881, while in the employ of appellant as a miner. 2. Lopez was the husband of respondent, and left him, surviving, his widow and one child of such marriage, a boy about a year and a half old. 3. Respondent is the administratrix of the estate of the deceased. The jury returned a verdict for three thousand dollars damages in favor of respondent.

An action of this nature would not lie at the common law.

Actio personalis moritur cum persona. Lord Campbell's act aided this defect. It has been incorporated in most of the statutes of the various states of the Union. The one of this territory is nearly that of New York. It in no sense depends upon any other statute, declaring some duty. The duty of keeping and working a mine in a safe condition and

manner to employees is one that obtains at the common law: Shearman & Redfield on Negligence, sec. 290 et seq.; 2 Bla. Com. 197, 198; *Taylor v. W. P. R. R. Co.*, 45 Cal. 323; *Beeson v. G. M. G. M. Co.*, 57 Id. 20; *Gay v. Winter*, 34 Id. 153; *Mathews v. Warner*, 29 Gratt. 570; S. C., 26 Am. Rep. 396; Cooley on Torts, 628 et seq.

The complaint omits to charge that the accident occurred without the fault of the deceased.

The allegation was not essential. That was a matter of pleading and proof by the appellant. The deceased's care for his own safety may fairly be presumed: Shearman & Redfield on Negligence, secs. 43, 44; *Robinson v. W. P. R. R. Co.*, 48 Cal. 409; *Knaresborough v. Belcher S. M. Co.*, 3 Saw. 446; *Holmes v. Clarke*, 6 Hurl. & N. 348; Wood's Master and Servant, 706, note.

The question of negligence is peculiarly one for the jury. Wood's Master and Servant, 725, 726, 727; *Pater-son v. R. R. Co.*, 76 Pa. St. 389; S. C., 18 Am. Rep. 412; *Laning v. R. R. Co.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417; *Gay v. Winter*, 34 Cal. 153; *Jamison v. San Jose & Santa Clara R. R. Co.*, 55 Id. 593; *Fernandes v. Sacra-mento City R. R. Co.*, 52 Id. 45; *Greenleaf v. Illinois Cent. R. R. Co.*, 29 Iowa, 14; S. C., 4 Am. Rep. 181; Shearman & Redfield on Negligence, sec. 11.

Did the deceased contribute to his own injury in a degree sufficient to prevent a recovery in this action?

This presents the only question we care to discuss at any length. The evidence in this particular is conflicting, and the rule is well established, that in such cases the appellate court will not disturb the verdict. *Hawkins v. Abbott*, 40 Cal. 639; *Rice v. Cunningham*, 29 Id. 492; *Jones v. Shay*, 50 Id. 508; *Hellman v. Howard*, 44 Id. 104; *White v. Lyons*, 42 Id. 283; *Trenor v. C. P. R. R. Co.*, 50 Id. 222.

Much stress is laid upon the fact that one of the wit-nesses testified in substance that the deceased knew the particular place in the mine was dangerous.

We are not conceding that the plaintiff's intestate had any knowledge of the real condition of the particular point of the accident. He certainly was unaware of the imminent danger in which he was placed, and there is nothing in the evidence from which to draw the conclusion that the defect

was apparent or obvious. It is only knowledge of this character that estops the servant from recovery. The master is bound not to expose the servant to dangers of which he knows, and it his duty to communicate to the servant any danger about the work which is latent or which has been brought to the master's direct knowledge. This the appellant did not do. The master is to take all necessary precautions for the servant's safety, and the servant is authorized in relying upon the superior skill and knowledge and care of the master in so doing. The servant's primary duty is obedience to orders, and the instances are countless, when in performing that duty, all of his attention and thought is required. Such are the facts of this case. The plaintiff's intestate was at the point in obedience to the orders of the appellant—he was not in the wrong in going there. The master had been previously informed of the risk, but in no wise made it known to plaintiff's intestate. The place was dangerous, but not obviously and immediately so—at least to the servant's knowledge. Other men had worked at that point quite recently and no accident happened, that is, so far as the deceased knew. Under this state of facts, the employer is clearly responsible. In *Patterson v. Pitts & Co. R. R. Co.*, 76 Pa. St. 389; S. C., 18 Am. Rep. 412, the court said: "Where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which though dangerous is not so much so as to threaten immediate injury or where it is reasonably probable that it may be safely used, and by extraordinary caution or skill, the master is liable for a resulting accident." The case is of value, because the plaintiff had some knowledge of the dangerous condition of the machinery, and that fact was relied upon and urged.

In *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; Wood's Master and Servant, 725, which has, in a measure, come to be regarded as a leading case, Bigelow, J., said: "The plaintiff was in the discharge of his duty in placing himself in a perilous position—a duty the performance of which was known to and sanctioned by the defendant. The fact that he was in such a position has no tendency to prove that he was negligent or careless. It may be suggested that the plaintiff ought not to recover because he continued

in the performance of his duties after he was aware of the existence of the defect in the road. * * * His continuance in the employment did not necessarily and inevitably expose him to danger."

Clarke v. Holmes, 7 H. & N. 937; *Wood's Master and Servant*, 720, note, an English authority and frequently resorted to, was a case where the master had promised the servant to repair the defect. After stating the reasons why plaintiff should recover, Chief Justice Cockburn said: "Besides, a servant knowing the facts, may be utterly ignorant of the risk."

In *Baxter v. Roberts*, 44 Cal. 188, Wallace, C. J., said: "Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is, from extraneous causes known to him, hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information; these general principles are elementary and fully established.

"The employer, if he knew or was informed of a threatened danger, was bound to communicate the information to his employee about to be exposed to it in the course of his employment; * * * and if the employer have such information or knowledge, and withhold it from the employee, and the latter afterwards be injured in consequence thereof, the employer is liable to him."

In another case where the plaintiff knew of the defect some time prior to the accident, and was injured while in the discharge of his duty about the defect, it was held that the question whether the plaintiff was negligent to such an extent as to prevent a recovery by him, depended upon whether he knew the danger incident to doing the act in view of the defect, the injury not being a necessary or inevitable result of doing the act. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Wood's Master and Servant*, 732.

The following cases sustain the rule as announced by the above decisions: *Ford v. R. R. Co.*, 110 Mass. 240; *Plunk v. R. R. Co.*, 60 N. Y. 607; *Laning v. R. R. Co.*, 49 Id. 521; *Gibson v. R. R. Co.*, 46 Mo. 163.

We add that it is not necessary that plaintiff's intestate should have been free from all negligence in order for a recovery. If his negligence was slight or remote, and the defendant's gross or proximate, a recovery may be had. *Union Pacific R. R. Co. v. Rollins*, 5 Kans. 167, 191; *Kenney v. Pacific R. R. Co.*, 45 Mo. 255; *Chicago, Burlington & Quincy R. R. Co. v. Van Patten*, 64 Ill. 510; *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400.

Evidence is admissible if it is of a circumstance which, with other circumstances, tends to convince the mind of the truth of the main matter.

The *gravamen* of the charge is the negligence of the defendant. The employer who oversees and controls the works must see that they are safe. His prior knowledge of any defect is of the utmost importance. It may conclusively establish his negligence. It would be interesting to learn in what manner a dangerous place in a mine, and that the master was aware of it, could be better proved than by showing former accidents at that particular place a few days before the fatal one, by the caving in of the soil and rock, and that a knowledge of such accident was conveyed directly to the master. Such was the tendency of the evidence objected to. That is the rule followed in reference to prior fires from locomotives, also in regard to falling of an elevator. *Shearman & Redfield on Negligence*, sec. 333; *Malone v. Hawley*, 46 Cal. 409; *Henry v. S. P. R. R. Co.*, 50 Id. 176; *Longabaugh v. Vir. City & T. R. R. Co.*, 9 Nev. 272; *Hull v. Sacramento Valley R. R.*, 14 Cal. 388; *Gandy v. R. & N. W. R. R. Co.*, 6 Am. Rep. 683; *Field v. N. Y. O. R. R. Co.*, 32 N. Y. 339; *Sheldon v. Hudson River R. R. Co.*, 14 Id. 218.

6. The superintendent of a mine, invested with full power to choose his own assistants, to control and discharge them, and regulate the work of the mine, is not a fellow-servant with those engaged under him.

We are aware that in some states the decisions are adverse to the above doctrine, but we believe the weight of authority is in favor of the rule. *Beeson v. Green M. G. M. Co.*, 57 Cal. 20, and cases there cited.

By Court, FRENCH, C. J.:

This action is necessarily brought under the statute by the representative of the deceased, Florence Lopez. For about seven years prior to his death he had been employed in working as a miner in appellant's mine, the Vulture mine. On June 21st he was killed while working in said mine. The place in which he was at the time working was an open cut about one hundred and fifty feet wide at the top and about fifty or sixty feet deep. The rock was blasted and excavated, and pried down the side of the open cut, from near the surface, by other miners who were accustomed to give notice of the blasts and descent of the rock. Lopez's location was in the bottom of the cut, his work being the removal of the rock, thus thrown down by the miners above, to a chute. He was killed by some rock falling on him while so working.

The case was tried by a jury, which returned a verdict for plaintiff. Defendant moved for a new trial, which was denied. Defendant appeals to this court, from both the judgment and the order denying it a new trial.

The complaint does not state that the dangerous condition of the mine was not known to deceased, nor that it could not, with reasonable effort, have been discovered by him, nor that deceased was free from negligence, nor that he prudently attempted to avoid the danger.

Defendant demurred to the complaint, on the ground of want of sufficient facts to support the action, but specified the defects, and the omission to charge that the accident occurred without the fault of deceased is not among the specifications, and the practice is, that the party shall be confined to his specifications, although, if no specification be made under this ground of demurrer, it might stand on any defect.

But this specific defect is raised on the introduction of plaintiff's testimony, and on the motion for a nonsuit it became a proper subject for consideration. On this point, in this class of cases, there is very nearly an equally balanced conflict of practice in the courts of the different states, and we are not disposed to hold that absence of fault on the part of plaintiff must be averred and proved by plaintiff, while probably the preponderance of authority and practice hold

it to be matter for the answer and defense. An examination of authorities will show that the rule is not inflexible, even in the courts that hold respectively to the one or the other practice, but must depend, in some cases at least, on the facts, exigencies, and circumstances of the particular pleadings and cases.

The court did not, then, err in refusing the nonsuit so far as this point is concerned.

Then did the evidence on the part of plaintiff at this stage of the case show contributory negligence on the part of deceased? In *McGlynn v. Brodie*, Justice Sawyer, on page 380, 31 Cal., speaking for the court, says: "The risk of the accident was a risk incident to the employment in which the plaintiff was engaged. Possessed of all the knowledge which the defendants had as to the condition of the cupola, and with an opportunity of becoming better informed in the progress of the work in which he was engaged, plaintiff accepted the employment, and continued in it down to the moment of the accident. Where a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and can not maintain an action for injuries sustained and arising out of accidents resulting from such defective condition of the machinery. This is the principle established by all the cases."

This is the doctrine laid down, not only in all the cases, but in the elementary works of Shearman & Redfield on Negligence, Thompson on Negligence, and other treatises on the same subject.

Without passing upon the question whether plaintiff's evidence shows that deceased knew of the danger at the point where he was working or had the means of knowing, does not the whole testimony in the record show without substantial conflict that he had such knowledge?

As to the general rule that a plaintiff can not recover for the negligence of the defendant if his own want of care or negligence has in any degree contributed to the result complained of, there can be no dispute. *Robinson v. W. P. R. R. Co.*, 48 Cal. 421, and cases there cited.

But it is necessary to distinguish between the act and fault of the complaining party. It is no defense to an action of this kind that the act of the deceased might have contributed or did contribute to the injury. It must be by his fault, not merely his act.

Was there negligence on the part of defendant? or, in the language of the statute, was there wrongful act, neglect, or default on its part?

Plaintiff alleges in her complaint: "That defendant wrongfully and carelessly neglected to keep in good and safe condition and repair [said mine], by building and maintaining in its tunnels, shafts, and excavations proper and sufficient supports and pillars, to prevent said tunnels and excavations from caving in," etc.

This is a broad allegation as to the mine generally, but the question in the case is as to the point only where the accident occurred. This was neither a tunnel nor shaft, but an open cut, and the work at this point consisted in blasting and prying down the rock, not in supporting it in place, and the evidence of defendant shows that this was the only practicable way of working the mine at this place, and there is no conflicting evidence to this whatever.

In order to recover, the plaintiff in an action of this kind must show that the act complained of was caused by the wrongful act, neglect, or default of defendant. It must also appear, by implication or otherwise, that the injured party did not in any degree contribute to the injury by his fault.

All proceedings, rulings, or instructions which conflict with, or even ignore, these last two propositions are erroneous in all trials. Tested by this rule, the statement on motion for a new trial in this case shows good, broad, cogent, decisive, and most ample grounds in support of the motion.

The judgment and order denying a new trial must be reversed, and the cause remanded for a new trial, and it has been so ordered.

PINNEY, J., concurred

A. T. REPTS. I-31

IN RE WALDRIP.

IMPRISONMENT IS LEGAL, UNDER SECTION 19 OF THE HABEAS CORPUS ACT, where the commitment, which in this territory is a certified copy of the judgment, fully shows the character of the court rendering the judgment, the names of the judge and clerk, and the date of the judgment, although such judgment does not contain the usual recitals.

RETURN TO WRIT OF HABEAS CORPUS, WHICH SETS OUT IN FULL THE RECORD of the proceedings under which the petitioner is held, is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being admitted as true, negatives the same.

APPEAL from the district court of the third judicial district, county of Mohave. This was an application for a writ of habeas corpus. The opinion states the facts.

A. C. Baker, for the petitioner.

A. E. Davis, for the respondent.

By Court, FRENCH, C. J.:

On the petition of said Waldrip, a writ of habeas corpus was granted at the January term against C. V. Weeden, in charge of the territorial prison at Yuma, where the said petitioner was imprisoned, returnable at the adjourned term, to show cause for holding petitioner in custody. The petition claiming that the commitment—which in this territory is a certified copy of the judgment—was defective and insufficient in law to warrant the detention of the petitioner in custody.

Section 2218 of compiled laws, being section 19 of habeas corpus act, reads as follows:

"It shall be the duty of such court or judge, if the time during which such party may be legally detained in custody has not expired, to remand such party if it shall appear that he is detained in custody: 1. By virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree."

The commitment in this territory is a certified copy of the judgment.

The judgment in this case does not contain the usual recitals. But it is still a judgment under the section above quoted, and the commitment is a process issued upon such judgment, and fully shows the character of the court rendering the judgment, name of the judge, clerk, and the date of such judgment.

We are therefore of the opinion that the imprisonment of Waldrip was legal under both the first and second provisions of said section 19, as tested by the habeas corpus act.

But Weeden, the custodian of the prisoner, in his answer to the writ, returns the whole record of the court in the case, including the presentment of the indictment, the indictment itself, the demurrer thereto, affidavit for change of venue, the record of the impaneling of the trial jury, the action of the court at all stages of these proceedings, charge to the jury, and the verdict in the trial, and all the minutes and proceedings of the court thereon.

This return (which is unquestioned) constitutes a full, complete, and decisive answer to every allegation contained in the petition and application of petitioner, and being admitted as true, negatives the same.

It was ordered by the court that the writ be discharged and the prisoner remanded.

PINNEY, J., concurred.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA,
JANUARY TERM, 1884.

TERRITORY OF ARIZONA *v.* VINCENTO CASIO.

IN PROSECUTION FOR LARCENY OF PROPERTY THAT DOES NOT EASILY PASS FROM HAND TO HAND, THE PRISONER'S EXCLUSIVE AND UNEXPLAINED POSSESSION of the stolen property, recently after the theft, is not only a circumstance to be considered as tending to show the prisoner's guilt, but raises such a presumption that he is the thief that the burden of proof is taken from the prosecution and laid upon him.

APPEAL from a judgment of the district court of the first judicial district, county of Pima, convicting the defendant of grand larceny. The opinion states the facts.

No appearance for the appellant.

Clark Churchill, attorney general, for the respondent.

By Court, PINNEY, J.:

The appellant was tried and convicted of grand larceny, and sentenced to the penitentiary for the term of two years, from which judgment he appeals to this court, and assigns several grounds of error. Among others, the defendant

asked the following instruction: "The mere possession of stolen property is a circumstance to be considered in determining the guilt of the possessor, but this circumstance is not of itself sufficient to authorize a conviction," which was refused by the court, and in the charge to the jury the following was given: "As a point of law, I charge you that possession of property recently stolen is sufficient to put the possessor upon his defense, and calls for satisfactory explanation; and it is for you, gentlemen, to say whether you are satisfied with the explanation of the defendant as to the manner in which he came into the possession of this ass. Its possession may be considered *prima facie* evidence that the possessor came into its possession unlawfully, unless he can show by undoubted proof that it came into his possession in a legitimate and lawful manner. It is for you, gentlemen, to say whether he has shown by that undoubted proof, or whether he has proved at all, that he came into possession of this ass in a legitimate way. The burden of proof in every instance rests with the prisoner."

The facts in this case in brief are, that the complaining witness was the owner and possessor of an ass; that he had him running near his house; that he was stolen, and in about two months after he was stolen the defendant and appellant was in possession of the ass, claiming him as his own, and sold and delivered him to another party, in whose possession the real owner found him. This was in substance the proof on the part of the prosecution. The defendant was sworn, and testified that he traded a horse for this and another ass, and gave the man's name with whom he traded, but was unable to tell where the man was at the time of the trial.

The charge of the court below on the question of possession of stolen property is couched in rather strong terms; but taking that charge together with the whole charge of the court, and the facts in proof in the case, we can not see that any such injustice has been done the defendant as would entitle him to another trial, provided the instruction given as to possession of property recently stolen is the better law. On this subject the reported cases are numerous, and some discord seems to exist. The larceny being shown, and the property found in the possession of the defendant

soon enough after the theft to make it recent, is that a mere circumstance tending to show guilt, to be considered by the jury? or is it *prima facie* evidence that the possessor is the thief? And is the burden of proof then shifted? and must the defendant satisfactorily explain such possession?

In *People v. Chambers*, 18 Cal. 383, that court holds that such possession is a circumstance to be considered in determining the guilt of the possessor. In that case the larceny charged was stealing money and watches. And in that class of cases, to say the least, the doctrine that recent possession of stolen property is *prima facie* evidence of guilt, should be greatly modified. Indeed, the authorities all seem to tend in that direction. The same rule should not apply to small articles which readily pass from hand to hand as it does to property which can not be so easily and artfully disposed of. Had the California courts remained content with the doctrine laid down in *People v. Chambers*, *supra*, and as applied to the facts in that case, we might have been disposed to agree with them. But in the case of *People v. Brown*, 48 Cal. 253, in which the defendant was charged with stealing a mare, the doctrine that the recent possession is a mere circumstance to be considered, etc., is again approved of by that learned court. And while we are not unmindful that there are cases where great injustice may be done to a defendant by holding a different rule—holding to the old rule, we may say—still the rule of injustice is one which works both ways. And with all due respect, we must differ from the rule as laid down in the case last cited. Indeed, the great weight of authority seems to be against the doctrine there held.

It has been generally understood that the prisoner's exclusive and unexplained possession of stolen property recently after the theft raises the presumption that he is the thief, and that this presumption takes the burden of proof from the prosecution, and lays it upon the prisoner. *Rosc. Cr. Ev.* 18; 2 *Russ. on Crimes*, 337. To the same effect see *Phillips on Ev.*, 7th ed., 186; *Knickerbocker v. People*, 43 N. Y. 177; *People v. Walker*, 38 Mich. 156; *State v. Brady*, 27 Iowa, 126; *State v. Creson*, 38 Mo. 372; *State v. Turner*, 65 N. C. 592; *Waters v. People*, 104 Ill. 544; *Sahlinger v. People*, 102 Id. 24. And so far as we have been able to dis-

cover, the California courts stand almost alone in the modification of the doctrine.

It is unnecessary to discuss this subject further. Whether a case is sufficiently strong against the accused to warrant his being called on for his defense must necessarily depend upon the facts in each given case. The other errors assigned not being sufficient to warrant a reversal of the judgment, Judgment affirmed.

FRENCH, C. J., concurred.

WILLIAM N. TWEED v. SAMUEL A. LOWE ET ALS.

WHETHER APPELLATE COURT SHOULD GRANT NEW TRIAL FOR ERROR in admitting evidence of a parol agreement between the parties when a written agreement was alleged, unless it is plain from the whole case that a different result would be reached on a new trial, *quære*.

PARTNERSHIP AGREEMENT REDUCED TO WRITING, BUT NOT EXECUTED by the partners, is not evidence of the terms and conditions of the partnership.

WHEN THERE IS EVIDENCE TO SUSTAIN THE JUDGMENT, the same will be affirmed.

APPEAL from a judgment of the district court of the first judicial district, county of Pima, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

Smith, Oury & Baker, for the appellant.

H. B. Summers, for the respondents.

By Court, PINNEY, J.:

The complaint alleges that Samuel A. Lowe located the El Capitan mine in September, 1877, and that defendant William N. Tweed asserted title to and claims to be the owner of an undivided one half interest in said mine by virtue of a written agreement, which claim, it is alleged, is without any right whatever, etc. In the prayer it is asked that the defendant may be required to set forth the nature of his claim, and that a decree may be granted declaring and adjudging that plaintiffs are the owners of said mine, and

that defendant has no estate or interest whatever in said mine.

The answer admits that Lowe located the mine as alleged in the complaint, and that the plaintiffs are co-owners and in possession of the undivided half of said mining claim, but asserts ownership in and to one half of said claim. And this was the real issue which was tried by the court below without a jury. The issues of fact and conclusions of law were found against the defendant Tweed. A motion for a new trial was made and overruled, to which order the defendants duly excepted, and appealed therefrom to this court.

It is now insisted by appellant that the court below erred in permitting parol proof of the contract between the parties, when they had declared upon a written contract. The complaint alleges that the defendant claims by virtue of a written agreement, not that the plaintiff claims title by virtue of a written agreement, and even if the complainant did claim by virtue of a written agreement with the defendant, it is doubtful if this court would reverse the judgment for that reason, unless we could see from the whole case as presented that a different result would be reached on a new trial.

It seems from the proof that Lowe and Tweed did enter into some kind of an agreement for working and locating mines. The Little Giant was then discovered, and Lowe was at work on it, and Tweed was to become a half-owner by furnishing provisions, etc., to carry on the work. Tweed claims his agreement was that he should become a partner in the El Capitan mine as well as the Little Giant, while Lowe claims his agreement only applied to the Little Giant mine. Lowe had a writing drawn up, which he signed, and which he afterwards gave to Tweed, which writing Tweed had in his possession for some time, but never signed it. This writing was offered in evidence and excluded by the court. It never having been executed by the parties, it left the whole matter as if no writing had been drawn, and the case then rested on the parol agreement made at the time the contract was entered into between the parties.

And it is urged that the proof largely sustains the claim of appellant to an undivided half of the El Capitan mine.

We have examined the whole evidence as contained in the transcript, and, without enlarging upon the subject, we are satisfied the proofs sustain the judgment of the court below, and the same will be affirmed.

Judgment and order affirmed.

FRENCH, C. J., concurred.

THOMAS L. DAWSON v. GEORGE LAIL.

CAUSES OF ACTION, STATEMENT OF.—In an action on several bills of exchange, all bearing the same date, payable to the same party, due at the same time, the better practice is for the complaint to contain a separate statement on each bill. If, however, the complaint contains but a single statement, an order overruling a demurrer thereto will not be disturbed.

COSTS OF PROTEST OF INLAND BILL.—The allowance of costs for the protest of inland bills of exchange is not reviewable on appeal, when no motion to retax costs was made in the lower court.

APPEAL from a judgment of the district court of the third judicial district, county of Yavapai, entered in favor of the plaintiff. The opinion states the facts.

F. P. Dann, for the appellant.

W. I. McPheters, for the respondent.

By Court, PINNEY, J.:

This was an action brought on five several bills of exchange executed by the appellant, all bearing the same date, and all due and payable at the same time, and all made payable to the respondent or his order, and each for the same amount.

The complaint states but one cause of action. A demurrer was interposed on the ground that more than one cause of action being declared upon, the complaint should separately state the same. The demurrer was overruled, an answer filed, the cause tried, and judgment entered in favor of respondent.

It is claimed that the court below erred in overruling the demurrer. Counsel insist that where a complaint sets up more than one cause of action, each count must contain all

the facts necessary to constitute a cause of action. Section 64 of chapter 48, compiled laws, provides that the plaintiff may unite several causes of action in the same complaint, when they all arise out of contracts, express or implied, etc., when the causes of action so united shall all belong to one class, affect the same parties, tried at the same place, and be separately stated.

It is claimed that several bills of exchange are several causes of action and should be separately stated. In *Van Namee v. Peoble*, 9 How. Pr. 198, it is held that each promissory note is a distinct and complete cause of action in itself, and must be stated in a separate count.

The complaint in that case set forth three promissory notes of different dates and amounts, and while we are of the opinion that the better practice would be to make a separate statement on each note or bill, still, in a case like the one at bar—where the bills all bear the same date, and are made payable to the same party, and at the same time—we do not feel inclined to disturb the judgment, because a separate statement is not made.

A protest of each of the bills was made by the respondent, for which costs were allowed in the sum of twelve dollars and fifty cents, and it is urged that no protest of an inland bill of exchange is necessary unless prescribed by local law. Conceding this to be the law, there was no motion made in the court below to retax costs, and that question can not be raised for the first time in this court.

Judgment affirmed.

SHELDON, J., concurred.

CHARLES O. MILES ET AL. v. D. W. McCALLAN ET AL.

JUDGMENT FOR PLAINTIFF ON THE PLEADINGS can not be rendered when the answer denies any of the material allegations of the complaint, or sets up new matter constituting a defense.

FINDINGS SHOULD BE CONFINED TO CONTESTED FACTS and determined from the evidence. Findings as to facts admitted by the pleadings are unnecessary.

APPEAL from a judgment of the district court of the first judicial district, county of Pinal, entered in favor of the plaintiffs. The opinion states the facts.

Horace L. Smith, for the appellants.

No appearance for the respondents.

By Court, FRENCH, C. J.:

This is an action under the statute to quiet title to a mining claim.

Both the complaint and answer are verified. The answer expressly admits certain allegations of the complaint, but expressly and specifically denies the more material allegations. It also sets up new matter as a separate defense which if established by proofs would be fatal to plaintiffs' action.

The practice of expressly admitting in an answer portions of the complaint is not commendable, because it is entirely unnecessary, and adds to the length of the answer without effecting any useful result. The silence of the answer as to any allegation of the complaint effects precisely the same result, and shortens and simplifies the pleadings.

What is not denied is admitted, and there can be no reason for expressly admitting it.

A motion for judgment on the pleadings was made by plaintiffs and granted by the court. This was clearly error. The answer specifically denies both the ownership and the possession of plaintiffs, and the original location by plaintiffs' grantors. These are material allegations without proof of which the plaintiffs can not maintain their action.

The separate answer presents another bar to any judgment on the pleadings. In passing upon the motion for judgment on the pleadings, the court files findings of fact, and apparently bases its judgment upon such findings. Strictly, there can be no findings of fact when the judgment is upon the pleadings. Such judgment rests upon the pleadings. A finding of fact is a determination of a fact by the court, which fact is averred by one party and denied by the other, and this determination must be founded on the evidence in the case. Such facts as are

properly averred on the one side, and properly denied on the other, constitute the issues in the case. All findings outside of these issues are of no legal force or value. The findings should be confined to the contested facts, and their determination attained from the evidence in the case.

Facts admitted by the pleadings may be referred to, mentioned, or recited, but this should be done in such a way as to distinguish them from the findings on the controverted facts, without recurrence to the pleadings.

Judgment reversed, and cause remanded for trial on the issues raised by the pleadings.

PINNEY, J.:

I concur in the judgment, but think it immaterial whether the answer admits or is silent as to portions of the complaint.

DANIEL JOHNSON ET AL., RESPONDENTS, v. JOHN McLAUGHLIN ET AL., APPELLANTS.

LAWS OF UNITED STATES RELATING TO ACQUISITION OF TITLE TO MINERAL LANDS on the public domain are paramount, and the laws of a state or territory, so far as they conflict therewith, are entirely nugatory.

LOCATION OF MINING CLAIM RECORDED IN STRICT COMPLIANCE WITH LAWS OF UNITED STATES and of the territory of Arizona, in the recorder's office of the proper county, is valid, although not recorded with, nor examined by, the local district recorder, in compliance with the local regulations of the mining district.

FAILURE TO COMPLY WITH LOCAL REGULATIONS OF MINING DISTRICT DOES NOT WORK FORFEITURE of a prior location, unless such regulations prescribe a forfeiture as the penalty of their non-observance.

APPEAL from the district court of the first judicial district, county of Pima. The opinion states the facts.

Ben. Morgan, for the appellants.

The only point in this case is whether the right to a mine once acquired by complete compliance with the laws of the United States and of this territory can be taken away by reason of the omission to comply with a district regulation to which no penalty is attached. In other words, whether the discoverer of a ledge, after marking it upon the ground

by monuments, so that his claim may be readily traced, and placing written notices upon the monuments defining the extent of the claim, can be divested of his property and possession because of non-compliance with a district law which serves no useful end or purpose. The revised statutes of the United States, section 2324, provide that "all records of mining claims hereafter made shall contain the names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." The party who makes the record is the recorder. Suppose he should omit any of the above requisites, would the locator lose his rights, and if so, upon what theory? It will be observed that what the locator is compelled to do is entirely different from the duties of the recorder. The only object of a record under the law is to give notice of the ownership of the claim. Prior to the enactment of that law, it was for the double purpose of giving notice and of preventing a swinging of the claim.

In the case of the *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 330, the court say: "The requirements of the law as to what the record shall show are evidently designed to fix the *locus* of the claim, in order to prevent floating. But the monuments defining the claim on the ground answer this purpose better than the record, and if they are to be erected in the beginning, there can be but little use ever to make a record."

In this case Johnson went upon the ground located as the "Red Top," with its *locus* fixed, as the court finds, by seven monuments, with the notice upon it, and seen by him, and proceeded to locate the identical claim for the reason, as he says: "The notice had run out fifteen days; it had been subject to re-location for fifteen days." The court finds that under the district laws, "the recorder is prohibited from recording the claim if he finds a prior valid claim thereto," so that when he went upon the "Red Top" claim he was confronted with an insuperable obstacle to the record of the Montreal. The "Red Top" was already a valid location under the United States laws.

Forfeiture is a question of fact, and the doctrine is laid down in the following cases: *McGarrity v. Byington*, 12 Cal.

426; *Colman v. Clements*, 23 Id. 245; *Bell v. Bed Rock T. & M. Co.*, 36 Id. 214. Abandonment is a question of fact resting upon the intent of the parties. It would be absurd to urge estoppel.

Earll and Smith, for the respondents.

Counsel for appellant assume that the point presented by the record in this case is "whether the right to a mining claim once attached can be taken away by reason of non-compliance with the law of the district." In this position counsel is in error. He fails to make the distinction existing between a right attached, and a forfeiture of such right by reason of subsequent non-compliance with some rule of the mining district in which the claim is situated, the observance of which is necessary to the right of continued possession. The real point involved is, can any one qualified to occupy and possess the mineral lands of the United States, attain the full right to hold the same except under compliance with the acts of congress in relation thereto, and such other laws of the territory, and of the mining district in which such lands are situated, as are not repugnant to the laws of the United States?

It will not be questioned that the miners of a mining district have the right to establish rules and regulations concerning the location and occupation of the mineral lands of the United States, and that such rules have the force of law when not inconsistent with the laws of the United States. U. S. R. S., secs. 2322, 2324; see also Comp. Laws, 512, sec. 1.

It is made imperative by the rules of Smith's mining district, that all mining claims located in that district shall be recorded in the mining records of the district within thirty days after the same are located. The observance of this rule is made a condition precedent to the right to hold a mining claim, and without complying with the rule the right to hold possession is not attained; it has not attached.

The reason of this rule is so apparent that its discussion is unnecessary. It is obvious that its enforcement is as necessary as any other act of location required by the laws of the United States. Each act required to be done, when performed, operates as matter of notice of the right to occupy, and that it is a valid claim.

The record in this case shows that appellants did not do any work upon the claim in controversy until after the entry thereon by respondents, and while respondents were in possession, and had the right of possession. The location of appellants was not valid—no right by them had been acquired. Not having complied with the law of location, the claim was open to entry and occupation.

It is the policy of the government to have the mineral lands occupied and worked, and not taken and held for mere speculative purposes; and those who will not abide by the law governing this license must give way to those who will comply with its plain and liberal provisions.

"The mining laws of the United States recognize and sanction the custom among the miners of organized mining districts, to adopt local laws or rules governing the location, recording, and working of claims, not in conflict with the state or federal legislation." *Golden Fleece v. Cable Con. M. Co.*, 12 Nev. 312.

"In order to secure the right of possession to a mining claim, there must be a compliance, not only with the laws of the United States, but also with such local regulations of the mining district as are not in conflict therewith." *Gleeson v. Martin White M. Co.*, 13 Nev. 442.

"The rules and customs which point out the manner of locating mining ground are conditions precedent which must be substantially complied with."

"The rules and customs of the miners in a particular district are laws, and constitute the American common law on mining the precious metals." *King v. Edwards*, 1 Mont. 235.

"The right to occupy, explore, and extract the precious minerals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated." *Robertson v. Smith*, 1 Mont. 410.

To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. *Strang v. Ryan*, 46 Cal. 33.

We hold that appellants at the time of the entry of re-

spondents upon the mining claim set out in this action had not acquired a right to the possession, because they had not complied with the law concerning location and occupancy: but simply for the sake of argument let us accept the theory of counsel for appellants, and admit that, at a time prior to the entry of respondents, appellants had attained the right to occupy; and admit still further, that the rule making a record of the notice in the district is a condition subsequent, and relates only to the right of continued occupancy. Even in that view of the case, we hold that such right was lost by reason of non-compliance with the law requiring the recording of the notice of location in the district.

“The rules and customs of miners, that require locators to do a certain amount of work upon their claims, are conditions subsequent, and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs.” *King v. Edwards*, 1 Mont. 235.

“A right to hold and work a mining claim when acquired may be lost by a failure or neglect to comply with the rules and regulations of the miners relative to the acquisition and tenure of claims in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer.” *St. John v. Kidd*, 26 Cal. 263.

It will be observed by the following decisions of the general land office that there is perfect accord in that department of government with the judicial determinations hereinbefore referred to.

“The mining laws of the United States recognize and sanction the custom among the miners of organized mining districts to adopt local laws or rules governing the location, recording, and working of claims, not in conflict with the state or federal legislation.”

“The rules and customs which point out the manner of locating mining ground are conditions precedent which must be substantially complied with.” *Mineral Lands*, 418.

In order to secure the right of possession to a mining claim there must be a compliance not only with the laws of the United States, but also with such local regulations of

the mining district as are not in conflict therewith." 8 Land Owner, 60.

"The right to occupy, explore, and extract the precious minerals in the mineral lands of the United States, becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated."

"To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated." Mineral Laws, 418.

We respectfully submit that the judgment of the court below is sustained by the law and evidence, and should be affirmed.

By Court, FRENCH, J.:

This action was heard before the district judge, without a jury, and full findings of fact filed.

No exceptions were taken, nor any objections made to said findings by either party. The judgment was for the plaintiffs.

A motion for a new trial was made by the defendants, on the grounds of insufficiency of the evidence to justify the decision and judgment, and that the same were against law, which motion was denied, and this appeal is from both the judgment and order denying a new trial. On its first hearing in this court the judgment and order denying a new trial were reversed, and the cause ordered remanded for a new trial. On the announcement of which decision both parties expressed a wish for judgment upon the findings, without a new trial. Upon petition a rehearing was granted, and upon such rehearing questions of law on the findings only were discussed.

The defendants located the claim in controversy on the twenty-first day of June, and recorded the same on the fifth day of July, in the recorder's office of the proper county.

The plaintiffs located the same ground on the fifth day of August, and recorded the same with the district recorder on the sixth of August, and with the county recorder on the fourteenth of August, all of said acts being in the months of June, July, and August, 1879.

The defendants' location and record being thus clearly first in priority, the only question in the case is, Did the defendants lose their right by failure to comply with the local requirement to record with the local district recorder, and to procure the district recorder to go upon the ground to examine the same?

The sixth finding is as follows: "That at the times of the respective locations of said premises, all the parties to this action were, and ever since have been, qualified to enter upon and explore the mineral lands of the United States, and locate, occupy, and purchase the same under the provisions of the laws of the United States; and the said defendants, and the said Daniel Johnson, in their respective locations of the premises, complied with the requirements of the laws of the United States and of this territory, and the rules and regulations of the said mining district, except the failure on the part of the defendants to file and record their location in the office of the recorder of said mining district, and their failure to procure the recorder of said district to go upon and examine the location as required by the local rules and regulations of said district.

The court finds (sixth finding) that said defendants, in their location of the premises, complied with the requirements of the laws of the United States, and of this territory, and the rules and regulations of the mining district, except in this respect.

The right to a mining claim rests: 1. On the laws of the United States; 2. On the laws of the state or territory; and 3. On the regulations of the mining district wherein the same is located.

By the express provisions of the United States statutes these regulations must not conflict with either the laws of the United States or the laws of the state or territory in which the district is situated.

The laws of the United States are of course paramount. The laws of either state or territory must not conflict with those of the United States, and so far as they do they are entirely nugatory to the extent of said conflict.

The more distinctly these classes of provisions are preserved, the more certain and easy are the rules of decision upon the aggregate provisions of all of them. It is not

proposed here to discuss generally, or even to enter upon the inquiry how, or how far legislative acts of state or territory may go upon the same subject-matter contained in the acts of congress, or how far local regulations may trench upon both United States and state or territorial provisions without legally conflicting with the paramount provisions. It is apparent that while the United States laws remain intact, a uniform basis is presented to the courts of all the mineral portion of the country for decision.

The legislature of a neighboring territory recently passed an act providing that the one hundred dollars' worth of labor or improvements on a mining claim which, by United States statutes, and entirely uniform decisions of all the courts, including the United States supreme court, may be made at any time *during the year*—must be made during the *first month* of the year.

This is indirectly in the nature of an amendment to the United States statute. The same reasoning applies to attempted changes in the provisions of state or territorial acts by local rules and regulations.

In view of the great magnitude of mining interests, the rules of decision as to title should be as certain as possible.

The respondents in this case earnestly urge that appellants never attained a full title to the ground in controversy.

The district regulation as to recording is in writing, and reads as follows: "Section 2. All claims shall be recorded within thirty days after the location." Trans., folio 94.

The right of appellant, whatever it was up to the expiration of these thirty days, can not be questioned.

Under the sixth finding, hereinbefore cited in full, the right of appellants was perfect up to this time; and this brings us back to the only question in the case, did the appellants lose their right by failing to bring the district recorder upon the ground, etc., and recording their claim with the district recorder? By the local regulations this district recorder is required to go upon the ground to inspect it, and "is inhibited from recording the claim if he finds a prior valid claim thereto." (Findings of fact, transcript, folio 19.) What is a valid claim is a question of law. On the sixth day of August the district recorder, with one of the respondents

herein, visited the ground and apparently decided this legal question in favor of the respondents.

The appellants had already, on the twelfth day of July preceding, filed and recorded their claim with the county recorder. The territorial laws give sixty days in which to record these claims.

The laws of the territory require all the claims of this kind (lode claims) to be filed and recorded in the office of the county recorder of the county in which such claims are situate, and give, as before stated, sixty days to make such filing and record after their location.

But aside from all these questions, should the right of a party who has complied, *in all respects*, with the laws of the United States and the territory, and the rules and regulations of the mining districts, except in the particular before mentioned, be taken away for failure to comply with a district regulation which provides no penalty or forfeiture for its non-observance?

At a time when the right to mining claims rested mainly on local rules, and before the existence of many of the present federal laws upon the subject, the supreme court of California, in *McGarrity v. Byington*, 12 Cal. 431, said: "The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as a result of the non-compliance with *such* of them as make a non-compliance a cause of forfeiture."

In *Bell v. Bed Rock T. & M. Co.*, 36 Cal. 219, Mr. Justice Sanderson, speaking for the court, says: "The objection taken to this instruction is that it directs the jury to find for the defendant, if they find from the evidence that the plaintiffs had failed to comply with certain mining rules and regulations without accompanying the same with a further charge, as to whether those rules and regulations declared a forfeiture as the result of such non-compliance. The failure of a party to comply with a mining rule or regulation can not work a forfeiture unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture. If so, a failure will not work a forfeiture."

The same doctrine is announced in *English v. Johnson*, 17

Cal. 118; Mr. Justice Baldwin delivering the opinion, and Mr. Chief Justice Field concurring. It has also been uniformly held by the supreme court of California, that abandonment of a mining claim may be proved under the general issue, but that forfeiture must be pleaded. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534; *Wiseman v. McNulty*, 25 Id. 230; *Morenhaut v. Wilson*, 52 Id. 263.

The forfeiture mentioned in these decisions is not the common-law forfeiture, but a mining-claim forfeiture, that is, the loss of the right, previously acquired, to hold and work a mining claim.

It is worthy of remark that this line of decision occurred in California during the existence of the following statute: "In actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations established and enforced at the bar or digging embracing such claims, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, *shall govern the decision* of the action." Act, sec. 621, p. 2. The above enactment makes no mention of federal constitution or laws, and some have inferred that no federal laws concerning these public mineral lands then existed. This is not the case—the United States government simply forbore to enforce the laws and rights of the United States then existing as to these lands. It is also probable that the doctrine of state ownership of the mines, then extensively entertained, but long since entirely abandoned, had more or less to do with the terms of this enactment.

It was made applicable to trials in justices' courts.

It may be reasonably questioned whether the concluding words "shall govern the decision of the action" is a proper provision.

The decision of all cases, it would seem, should be governed by all the law applicable thereto and all the legal evidence in the case. Gradually the courts of California adopted the principles of this enactment, and the courts and many of the legislatures of other mining states and territories recognized them to a greater or less extent, and finally the congress of the United States recognized and adopted them.

The decisive character of the California enactment makes

the decisions of her courts the more cogent, so far as denying forfeiture under said local regulations is concerned.

The rule as to forfeiture above recited, to wit: that the prior locator shall not lose his right by failure to comply with a local regulation unless such regulation prescribes a forfeiture as a penalty of its non-observance, has been criticised in some instances, and in *King v. Edwards*, 1 Mont. 235, disapproved; but it has been recognized as a safe and conservative rule of decision in the *nisi prius* courts of this territory, tending to the permanence and security of mining titles, and we are not prepared to reject it in the present case.

Judgment and order reversed, and court below directed to enter judgment on the finding for appellants.

PINNEY, J., concurred.

ADDITIONAL CASES.

NOTE.—The following decisions were found among the records of the court after the preceding portion of the volume was stereotyped, and for that reason they appear out of the order of date.

TERRITORY OF ARIZONA, RESPONDENT, *v.* MICHAEL KENNEDY, APPELLANT.

IN CRIMINAL CASE, COURT MUST COMMIT CHARGE TO JURY TO WRITING and read it to the jury, unless the defendant expressly waive his right to have it so given; and where this is not done at the trial, the error is not cured by subsequently reducing the charge to writing.

APPEAL from the district court of the first judicial district, county of Pima. The opinion states the case.

J. E. McCaffry, attorney general, for the respondent.

The act approved October 5, 1867, does not require that the charge shall be filed before the jury leaves the box; it is sufficient that it be written and filed.

The rights of the defendant have not been infringed; the charge is in writing and filed with the papers in the case.

The statute of October 5, 1867, was made to enable the defendant to except to any portion of the charge; no exceptions have been taken, and it is not claimed that the charge filed is not the identical charge delivered to the jury.

The decisions cited by counsel for appellant were made upon a law wholly different from this. Hittell's General Laws of California, sec. 1949.

The true intent of our laws in regard to proceedings in criminal cases is that the defendant can not take advantage of any informality which does not tend to his prejudice. Howell's Code, c. 11, sec. 223.

Acts *in pari materia* are to be taken, compared, and construed together, and the real intention of the lawgiver ascertained, although such construction seem contrary to the letter of the statute. *People v. Utica Ins. Co.*, 15 Johns. 379; S. C., 8 Am. Dec. 243; 1 Kent's Com. 501, 502, 505, 506; *Gibbons v. Ogden*, 9 Wheat. 188; *Church v. Crocker*, 3 Mass. 21.

By Court, TWEED, J.:

The defendant was tried and convicted of the crime of robbery in the district court for Pima county at the October term for the year 1871. The appeal is from an order of that court overruling a motion for a new trial, to which order the defendant, by his counsel, excepted. The error complained of, or so much thereof as we deem it necessary to consider, appears in the statement signed by the judge who tried the cause, and is to the effect "that the charge of the court to the jury was delivered orally," the defendant not having waived in open court his right to a written charge. It appears from the record that a written charge purporting to be the charge given by the court, was filed some days subsequent to the trial. Upon the argument of the cause before us, it was, we think, claimed that the charge was in fact reduced to and was "in writing" when delivered, but it was conceded that the charge was not read to the jury. The case stands in this regard precisely as did the case of the *Territory v. Duffield*, ante, p. 58, which has been decided at this term. Since the opinion in that case was prepared, his honor the chief justice has submitted to us a dissenting opinion therein. We have examined this dissenting opinion carefully and with great deference to the learning and judicial experience of the chief justice, but it fails to convince us that the conclusions arrived at by him are correct. That portion of section 368 of proceedings in criminal cases governing this matter reads as follows: "The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally." Comp. Laws, 137.

The provision is a most important one to a party charged with crime. It enables him, upon a motion for a new trial

or upon appeal, to reproduce the exact language of the charge, and to assign error, if the charge is legally objectionable, with a degree of precision and accuracy impossible to be attained when the charge is given verbally: nothing is left to the recollection of the court or the counsel in the cause. If a rigid adherence to this provision of our statute should defeat the ends of justice in any particular case, it is to be regretted; but however this may be, the rights which it secures to a defendant in a criminal action may not be denied him. The filing with the papers in the case of a written charge conforming as nearly as possible according to the recollection of the judge to the charge verbally given is in no sense a compliance with the law. Exactness, certainty, entire and complete accuracy, as to the whole charge, is what the law aims at, and this in the interest of the accused; and it seems to us that this certainty can not be so well attained in any other manner as by reading the charge to the jury, and we have no doubt that this is what the law requires to be done.

The judgment is reversed, and the cause remanded for a new trial.

REAVIS, J., concurred.

TERRITORY OF ARIZONA, RESPONDENT, v. JOHN DO, APPELLANT.

WHERE INDICTMENT DESCRIBES ACCUSED AS "JOHN DO, a Yuma Mohave Indian, whose true name is to the grand jury unknown," and the verdict set out in the transcript reads: "We, the jury, find the defendant *Que Cha Ca* guilty of murder as charged in the indictment," and there is nothing in the record to connect the party charged with the person against whom the verdict was rendered and judgment pronounced, the supreme court can not affirm the judgment of the lower court.

INDICTMENT WHICH CHARGES COMMISSION OF HOMICIDE "NEAR TOWN OF ARIZONA CITY, in said county of Yuma, and territory of Arizona," does not charge the offense to have been committed at a place within the jurisdiction of the court with the accuracy and certainty required in criminal procedure.

APPEAL from the district court of the second judicial district, county of Yuma. The opinion states the case.

By Court, TWEED, J.:

The defendant was convicted in the district court for the county of Yuma, at a term of that court held in November, 1871, of the crime of murder. The appeal is from the judgment. No exceptions seem to have been taken to any of the proceedings, and no motion made for a new trial. The transcript certified by the clerk contains a copy of the indictment, what purports to be the substance of the evidence on the trial, the verdict of the jury, and the judgment and sentence of the court, with some brief and very unsatisfactory memoranda of the minutes of the proceedings.

The indictment describes the accused as "John Do, a Yuma Mohave Indian, whose true name is to the grand jury unknown," etc. There is nothing in the record showing that upon the arraignment, or at any subsequent period, the true name of the accused was discovered, nor any order of the court that the proceedings should be continued against him by any other name. The verdict of the jury, however, is against one Que Cha Ca. The verdict, as it is set out in the transcript, reads as follows: "We, the jury, find the defendant Que Cha Ca guilty of murder as charged in the indictment."

All the proceedings subsequent to the verdict, including the judgment and sentence of the court, refer to and designate the accused by the name given in the verdict. Perhaps the full minutes of the trial would show that the name Que Cha Ca was properly substituted for that of John Do; but as the record comes to us, there is nothing to connect the party charged with the person against whom the verdict was rendered and judgment pronounced. No judgment affirming that of the district court could be entered by us upon such a record. But we pass to the consideration of an objection to the sufficiency of the indictment. It charges "that John Do, a Yuma Mohave Indian, whose true name is to the grand jury unknown, yeoman, late of the county of Yuma and territory of Arizona, on the twenty-first day of September, A. D. 1871, near the town of Arizona City, in said county of Yuma and territory of Arizona, with force and arms," etc.

If there is uncertainty in the portion of the indictment quoted as to the place where the homicide was committed,

whether in the county of Yuma or elsewhere, such uncertainty is nowhere in any other part of the indictment cured. Is there such uncertainty? We are compelled to the conclusion that there is, and that the clause quoted from the indictment may be strictly and literally true, and yet the homicide may have been committed on the side of the Colorado river opposite Arizona City, and in the state of California. We may err in this, but it seems to us that the indictment does not charge the offense to have been committed at a place within the jurisdiction of the court with the accuracy and certainty required in criminal procedure, and by the fourth subdivision of section 222 of proceedings in criminal cases. Comp. Laws, 123.

The judgment is reversed, and cause remanded for proceedings upon a sufficient indictment.

TITUS, C. J., and REAVIS, J., concurred.

WILLIAM S. OURY, ADMINISTRATOR OF THE ESTATE OF
CHARLES DANN, DECEASED, RESPONDENT, *v.* MILTON
B. DUFFIELD, APPELLANT.

ADMINISTRATOR MAY MAINTAIN POSSESSORY ACTION to recover real estate of his intestate, to the possession of which the law gives him the right, without alleging in his complaint any possession or right of possession in the intestate.

APPEAL from the district court of the first judicial district, county of Pima. The facts are stated in the opinion.

By Court, TWEED, J.:

This was an action of ejectment to recover land in Pima county. Judgment by default was rendered by the court against defendant, from which he appeals.

Some objections are made to the sufficiency of the summons by counsel for the appellant, which we think not well taken. It is in strict and literal compliance with the requirements of the statute. It is objected to the complaint that it alleges no possession or right of possession in the intestate. The complaint, however, does allege that the plaintiff, "as administrator, was seised in fee and entitled

to the possession of the premises," etc. The statute gives to the administrator a right to the possession of all the real estate of his intestate. Comp. Laws, 267, 268, sec. 114. And we see no reason why he can not maintain a possessory action to recover it. The complaint asserts his right to the possession as administrator, and the default confesses it. The judgment must be affirmed.

TITUS, C. J., and REAVIS, J., concurred.

**TERRITORY OF ARIZONA, RESPONDENT, v. THOMAS
DUNBAR, APPELLANT.**

DISTRICT COURTS HAVE JURISDICTION OF APPEALS FROM JUSTICES' COURTS
in criminal cases.

WRIT OF CERTIORARI CAN NOT BE INVOKED to review errors or mistakes,
where the court has acted within its jurisdiction.

By Court, FRENCH, C. J.:

The writ in this cause was ordered dismissed, there being no error in the record. But if error had occurred, this writ would still have been unauthorized and improper. The district courts of this territory have full jurisdiction to hear and determine appeals from justices' courts in criminal cases, and the writ of *certiorari* can not be invoked to review errors or mistakes where the court has acted within its jurisdiction. This kind of error can be reviewed and corrected only on appeal.

TWEED and PORTER, JJ., concurred.

**JAMES REILLY, APPELLANT, v. GEORGE TYNG, RE-
SPONDENT.**

WRIT OF CERTIORARI ISSUES ONLY WHERE EXCESS OF JURISDICTION HAS
OCCURRED, and then only when there is no appeal.

By Court, FRENCH, C. J.:

The order in this case was erroneously made, and the writ thereon improperly issued. Proc. in Civ. Cas., secs.

458, 464. No grounds whatever existed for the order or writ. This writ issues only when excess of jurisdiction has occurred, and then only when there is no appeal. Every point and proposition raised by appellant in this case is well taken, and uniformly supported by reason and authority.

It has accordingly been ordered that the said order be reversed, and proceedings under the same dismissed.

TWEED, J., concurred.

PORTER, J., dissented.

A. ROYCE, APPELLANT, v. LYMAN A. SMITH, RESPONDENT.

WRIT OF CERTIORARI ISSUES ONLY IN CASES WHERE JURISDICTION HAS BEEN EXCEEDED and there is no appeal.

By Court, FRENCH, C. J.:

The order and proceedings therein in this cause have been reversed, on the authority of the decision in *Reilly v. Tyng*, ante, p. 510, decided at the same term.

ANA MARIA FEDERICO, APPELLANT, v. WILLIAM A. HANCOCK, RESPONDENT.

ERROR MUST BE AFFIRMATIVELY SHOWN in order to justify an appellate court in reversing a judgment.

APPELLATE COURT CAN NOT DETERMINE WHETHER FINDING IS SUSTAINED by the evidence or not, where the record on appeal contains none of the evidence.

FINDINGS ARE CONCLUSIVE AS TO THE FACTS, when no motion for a new trial has been made.

PARTY ALLEGING ERROR MUST POINT OUT SPECIFICALLY in what the error consists, and wherein it occurred. A general allegation of error is never sufficient.

EXCEPTIONS MUST BE TAKEN AT TRIAL IN COURT BELOW, or they can not be regarded by the supreme court.

RIGHT TO TRIAL BY JURY DOES NOT EXIST IN EQUITY CASES.

By Court, FRENCH, C. J.:

The only papers contained in the transcript in this case are the following: The complaint, answer, findings of fact and conclusions of law, the judgment, notice of appeal, and clerk's certificate.

Nothing whatever is asked of the court in the brief of appellant. It simply discusses matters of law, none of which can by any possibility be raised on this record, and no relief or action of this court is asked for, or even suggested. There is no statement, no exceptions, none of the evidence, no specifications. The transcript contains only the six papers aforementioned, which are all regular on their face. Error must be affirmatively shown.

In the notice of appeal certain averments are made. For example, it is there (in the notice of appeal) averred "that the court erred in finding of fact that there was no fraud on the part of defendant." There are many reasons why this proposition can not be reviewed, or even considered, by the appellate court: 1. Because there is not a word of the evidence in the record. How, without any of the evidence, can the appellate court determine whether the finding is sustained by the evidence or not? 2. There was no exception or objection whatever taken to any of the findings in the court below. 3. There was no motion for a new trial.

The findings of the court below will not be reviewed on appeal unless there was a motion for a new trial. *Gagliardo v. Hoberlin*, 18 Cal. 395; *Allen v. Fennon*, 27 Id. 69; *People v. Banvard*, Id. 475.

No motion for new trial having been made, the findings are conclusive as to the facts.

2. It is averred, secondly, in the notice of appeal, "that the court erred in its conclusions of law; that the defendant was the rightful owner of said lots.

3. "That the court erred in decreeing the defendant in lawful possession, and that he is the legal owner and entitled to the possession of said lots."

These are general averments made for the first time long after the trial, that the court erred. There are no specifications whatever. When, where, or wherein did the court err? Legal errors of the court should be pointed out.

They should be excepted to in a legal manner, as the statute prescribes. Both the statute and practice require that the party alleging error shall specify and point out specifically the alleged error, wherein it occurred; put his finger, as the decisions express it, upon the precise error.

It is never sufficient to allege error in a general manner. The same may be said of the fourth averment in the notice of appeal.

If the facts claimed in plaintiff's brief, as established by the pleadings, etc., were believed by plaintiff to be so established, she should have moved the court for a decree in plaintiff's favor, and excepted to the action of the court, if refused. So all through the proceedings in the court below, if any ruling or action of the court was against the plaintiff's rights, an exception should have been taken. The same in regard to the findings and decree.

If error was committed, the court below should have had at least an opportunity of correcting it; and if not remedied, then upon proper exceptions and statement, or bill of exceptions, it might be corrected here.

The case is one purely in equity. In an equity case there is no right of trial by jury.

The case was heard by the court without a jury, and the pleadings, findings, and decree are all regular upon their face, without any statement, bill of exceptions, or any evidence. They can not be changed or disturbed by the appellate court.

The appellate court will presume in favor of the judgment below, unless the record clearly shows error. *Thompson v. Monrow*, 2 Cal. 99; *Kilburn v. Ritchie*, Id. 146.

The supreme court will not presume error, or that facts exist which would show error.

If the court below commits error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant. *Herriter v. Porter*, 23 Cal. 385.

All intendments must be in favor of sustaining the judgment of courts of original jurisdiction; and to disturb such judgment, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *Nelson v. Lemmon*, 10 Cal. 50.

If the court makes a finding of facts, but does not include a finding upon one of the issues raised, and the judgment rendered is based upon that issue, the presumption will be that the court found upon that issue in such a way as to sustain the judgment. *Sears v. Dixon*, 33 Cal. 326.

Every intendment is in favor of a judgment of a court of record. And until the contrary be made clearly to appear, the appellate court is bound to suppose that it was based on proper evidence. *Grewell v. Henderson*, 7 Cal. 291.

In the light of the foregoing authorities, and all authorities in equity practice and proceedings, and the practice of appellate courts, the record in this case is worthless for the purposes of an appeal, and utterly without merit, and the appeal is frivolous.

PORTER and STILWELL, JJ., concurred.

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WHERE ONE AGREES WITH ANOTHER TO TAKE A CERTAIN SUM FOR HIS PROPERTY, and the latter then sells it for double that amount, and the former conveys directly to the purchaser, the one so conveying can not recover from the party with whom he made the agreement the excess over the agreed price, where there is no evidence of fraud, or that he was acting as agent in the transaction. *Thorne v. Bowers*, 239.

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4. INDICTMENT SHOULD CHARGE ONE OFFENSE ONLY, and therefore an indictment which in one count charges the offense of resisting an officer in the execution of process, and in another count charges the offense of assault with a deadly weapon upon the person of the same officer, with intent to put him in fear and to compel him to obey an unlawful command of the defendant, is bad. *Territory v. Duffield*, 58.
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8. WHERE INDICTMENT DESCRIBES ACCUSED AS "JOHN DO, a Yuma Mohave Indian, whose true name is to the grand jury unknown," and the verdict set out in the transcript reads: "We, the jury, find the defendant *Que Cha Ca* guilty of murder as charged in the indictment," and there is nothing in the record to connect the party charged with the person against whom the verdict was rendered and judgment pronounced, the supreme court can not affirm the judgment of the lower court. *Territory v. Do*, 507.
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 11. IN ALL CRIMINAL CASES COURT MUST CHARGE JURY IN WRITING, unless the defendant expressly waive his right to have the charge so given. The judge must commit his instructions to writing and read them to the jury from the original manuscript; and where this is not done, the error is not cured by subsequently reducing them to writing. *Territory v. Duffield*, 58.
 12. CHARGE TO JURY IN CRIMINAL CASE MUST BE IN WRITING, signed by the judge, and filed with the papers in the case, and the record in the case must show that such charge was read to the jury, or that the defendant in open court consented that the charge should be given verbally. *Territory v. Gertrude*, 74.
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1. POSSESSORY RIGHTS, WHAT NECESSARY TO MAINTAIN EJECTMENT.—There are two kinds of possessory rights recognized in this territory, one based on the act of November 9, 1864, Compiled Laws, p. 536, the other resting on mere prior occupation. To maintain a right under the first, plaintiff must show a compliance with the statute; to succeed under the second, he must show prior possession without alienation or abandonment, down to the time of the entry complained of. *Rush v. French*, 99.
2. IN EJECTMENT IT IS NOT NEW MATTER to set up defendant's title. *Id.*
See PLEADING AND PRACTICE, 41; PUBLIC LANDS, 1.

EQUITY.

1. REFORMATION OF CONTRACT ON WHICH SUIT IS BROUGHT may be properly asked for in the answer thereto, if the suit is an original proceeding in equity. *Houghtaling v. Ellis*, 383.
2. TWO SYSTEMS OF LAW AND EQUITY CAN NOT BE BLENDED in the same action or proceeding in the federal constitutional courts. The equity jurisdiction of those courts is derived solely from the constitution of the United States and the acts of congress, and is the same in every state. *Id.*
3. EQUITABLE DEFENSE TO ACTION AT LAW CAN BE AUTHORIZED by territorial statutes, and has been so authorized by the statutes of the territory of Arizona. *Id.*

See JURY TRIAL.

ERROR.

See CRIMINAL LAW, 3, 13; MANDAMUS, 3; NEW TRIAL, 2; PLEADING AND PRACTICE, 6, 8, 10, 11, 13, 17, 22, 24, 33, 34, 42, 45.

ESTATES OF DECEASED PERSONS.

RECEIVER APPOINTED TO TAKE CHARGE OF ESCHEATED ESTATE of a deceased person is entitled to the custody of the realty only, and of the rents and profits thereof. The administrator of such an estate is the proper custodian of the personalty belonging thereto, and the district court has no authority to compel him to turn over the personal estate to such receiver. *Territory v. Forrest*, 49.

ESTOPPEL.

WHERE ONE PERSON MAKES DECLARATION TO ANOTHER that a third person is a joint owner with him in a water right, and such other person, relying on such declaration, purchases the interest of the third person, records his deed, and enters into possession, the person making the declaration will be estopped from denying the right of such purchaser. And those claiming under the person who made such declaration will be thereby put upon inquiry as to the true state of the title. *Campbell v. Shivers*, 161.

EVIDENCE.

1. JOURNALS OF LEGISLATIVE BODY ARE NOT EVIDENCE TO THE COURTS as to what laws were enacted by such body, and, in the absence of other evidence, a court is not warranted in finding that a general act has been passed by such legislative body, where such act has not been published amongst the laws, and no copy of it can be found enrolled in the office of the secretary of the territory, who is the lawful custodian of all original bills that have been properly passed. *Graves v. Alsap*, 274.
 2. DECLARATIONS OF AGENT, ADMISSIBILITY OF.—Where some evidence of the existence of an agency has been given, it is competent to give in evidence the acts and declarations of the agent respecting the subject-matter of his authority. *Cole v. Bean*, 377.
 3. DECLARATIONS OF GRANTOR AS TO NATURE OF TITLE HE ASSERTS, made during the time that he claimed title, are admissible, not only against himself, but against parties claiming under him. *Rush v. French*, 99.
 4. DECLARATIONS MADE BY PARTIES CLAIMING A WATER RIGHT that they would not permit a certain person to have any of the water, if made in the absence of such person and without his knowledge, are not admissible in evidence against him, in an action brought by such claimants to recover damages for the water taken by him. *Campbell v. Shivers*, 161.
- See CRIMINAL LAW, 5; JUDGMENTS, 6; PARTNERSHIP; PLEADING AND PRACTICE, 25.

EXCEPTIONS.

See PLEADING AND PRACTICE, 14, 31, 46.

FINDINGS.

See PLEADINGS AND PRACTICE, 33, 35, 40, 43, 44.

FORFEITURE.

See INTERCOURSE ACT, 5; MINING CLAIMS, 3, 9.

FRAUD.

FRAUD, WHAT NECESSARY TO DEFEAT RIGHTS OF ABSENT LOCATOR.—In order to render a location void as to an absent locator on the ground of fraudulent intent upon the part of those locating him, it is necessary to bring a knowledge of such fraudulent intent home to such absent locator, and to show an acquiescence in such fraudulent intent upon his part, with the purpose of carrying it out. *Rush v. French*, 99.

See CONTRACTS; JUDGMENTS, 5.

HABEAS CORPUS.

1. IMPRISONMENT IS LEGAL, UNDER SECTION 19 OF THE HABEAS CORPUS ACT, where the commitment, which in this territory is a certified copy of the judgment, fully shows the character of the court rendering the judgment, the names of the judge and clerk, and the date of the judgment, although such judgment does not contain the usual recitals. *In re Waldrip*, 482.
2. RETURN TO WRIT OF HABEAS CORPUS, WHICH SETS OUT IN FULL THE RECORD of the proceedings under which the petitioner is held, is a full and complete answer to every allegation contained in the petitioner's

application for his discharge, and being admitted as true, negatives the same. *Id.*

HUSBAND AND WIFE.

ACT OF 1871 GIVES WIFE PERFECT FREEDOM IN CONTROL, USE, AND ENJOYMENT of her separate property, and makes her wholly independent of her husband in regard thereto. *Woffenden v. Charauleau*, 346.

See COMMUNITY PROPERTY; MARRIED WOMEN; SEPARATE PROPERTY.

INDIANS.

See INTERCOURSE ACT.

INDIAN COUNTRY.

See INTERCOURSE ACT, 2, 3.

INDIAN RESERVATION.

See INTERCOURSE ACT, 6.

INDICTMENT.

See CRIMINAL LAW, 2-4, 8, 9, 15.

INJUNCTIONS.

See JUDGMENTS, 3.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 10, 12, 13, 22, 24, 25.

INTERCOURSE ACT.

1. CONGRESS HAS POWER TO REGULATE TRADE AND INTERCOURSE WITH INDIAN TRIBES inhabiting any portion of the public domain of the United States. *United States v. Richard & Co.*, 31.
2. INDIAN COUNTRY IS PORTION OF TERRITORY INHABITED BY INDIANS whose title has not been extinguished by the United States. *Id.*
3. LICENSE TO ENABLE CITIZEN TO TRADE WITH INDIANS is not required except in an Indian country. *Id.*
4. SEC. 19 OF ACT OF CONGRESS OF 1802, ALLOWING TRADE and intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, is in force in Arizona, because its provisions are applicable to the condition of affairs existing therein. *Id.*
5. PROPERTY OF TRADER SEIZED OUTSIDE OF INDIAN RESERVATION is not forfeitable by reason of the fact that he has no license to trade, from an Indian superintendent or agent. *Id.*
6. INDIAN RESERVATION IS CERTAIN LIMITED PORTION of our national domain, assigned by the federal government to a tribe or tribes of Indians, to be held by them according to the terms of the assignment. *Id.*

INTOXICATING LIQUORS.

See WITNESSES, 1.

JEOPARDY.

See CRIMINAL LAW, 16.

JUDGMENTS.

1. JUDGMENT IS FINAL WHEN RENDERED AFTER HEARING the complaint, answer, and argument of counsel for plaintiff and defendant, and the term at which it was rendered has elapsed. *Woffenden v. Woffenden*, 328.
2. COURT HAS NO POWER TO KEEP JUDGMENT UNDER ITS CONTROL, after it has decided the case on its merits, upon a proper hearing. *Id.*
3. WORDS "AND UNTIL THE FURTHER ORDER OF THIS COURT," added to a decree of the court making an injunction perpetual, do not make such decree interlocutory, nor do they give the party against whom the decree has been rendered the right to move for the dissolution of the injunction at a subsequent term of the court. *Id.*
4. JUDGMENT AND DECREE MUST BE REVERSED, UNLESS SUSTAINED BY THE PLEADINGS in the case. *Cole v. Bean*, 364.
5. DECREE DECLARING DEED TO BE A MORTGAGE IS NOT SUSTAINED by a complaint which asks that such deed be canceled and held for naught, on the ground that the grantor therein named was, at the time of its execution, incapacitated from making the deed, and that the execution of the same was procured by fraud and conspiracy. *Id.*
6. WHEN THERE IS EVIDENCE TO SUSTAIN THE JUDGMENT, the same will be affirmed. *Tweed v. Lowe*, 488.

See PLEADING AND PRACTICE, 3, 4, 39.

JURISDICTION.

1. JURISDICTION OF DISTRICT COURTS IN MATTERS COGNIZABLE IN PROBATE COURTS is wholly appellate. *Territory v. Forrest*, 49.
2. DISTRICT COURTS HAVE JURISDICTION OF APPEALS FROM JUSTICES' COURTS in criminal cases. *Territory v. Dunbar*, 510.

See CERTIORARI, 2-4; EQUITY, 2; PRESUMPTIONS.

JURY AND JURORS.

AFFIDAVIT OF JURE IS NOT ADMISSIBLE TO IMPEACH VERDICT of the jury, where the minutes of the court show that the verdict was in writing, signed by the foreman, that it was recorded by the clerk in the presence of the jury, that it was then read to them by the clerk, who asked them if that was their verdict, and they answered that it was. *Torque v. Carrillo*, 336.

JURY TRIAL.

1. RIGHT TO TRIAL BY JURY IN EQUITY CASES.—In cases of purely equitable cognizance it is entirely discretionary with the judge whether or not he will call in the aid of a jury to assist him in determining special issues of fact framed by the parties to the action. *Cole v. Bean*, 377.
2. RIGHT TO TRIAL BY JURY DOES NOT EXIST IN EQUITY CASES. *Federico v. Hancock*, 511.

JUSTICES' COURTS.

See JURISDICTION, 2; NEW TRIAL, 1; PLEADING AND PRACTICE, 32.

LARCENY.

See CRIMINAL LAW, 7.

LICENSE.

See INTERCOURSE ACT, 3.

LOCAL RULES AND CUSTOMS OF MINERS.

See MINING CLAIMS, 3, 4, 8, 9.

MANDAMUS.

1. WRIT OF MANDAMUS WILL NOT BE GRANTED TO CONTROL ACTION of any inferior court, board, or officer, in matters wherein their acts are of a judicial character, or wherein they are called upon to exercise discretion; but where their acts are ministerial only, and they fail or refuse to perform any act required by law, and the party injured has no other speedy and adequate remedy, he is entitled to this writ. *In re Woffenden*, 237.
2. MANDAMUS LIES TO COMPEL AN INFERIOR COURT, BOARD, OR OFFICER to perform a duty enjoined by law, but unless the act to be done is purely ministerial, it can not command how it shall be done. If the act, whose performance it is sought to compel, is judicial or discretionary in its character, no court has power by its writ of mandate to command in what manner the act shall be performed. *Osborn v. Clark*, 397.
3. MANDAMUS WILL NOT LIE TO COMPEL AN OFFICER to act on a matter upon which he has already acted, however erroneous his action may have been. The writ of mandate is in no case a process for the review or correction of errors. *Id.*

MARRIED WOMEN.

1. MARRIED WOMAN OF THE AGE OF TWENTY-ONE YEARS, OR UPWARDS, may convey or incumber her separate property in the same manner as if she was unmarried, and a conveyance thereof by her does not require to be acknowledged by her on an examination separate and apart from her husband. *Miller v. Fisher*, 232.
2. WIFE TWENTY-ONE YEARS OF AGE MAY CONVEY HER SEPARATE ESTATE in precisely the same mode that she could if unmarried, and her acknowledgment of a deed does not need to be different in form from that of other persons. *Charauleau v. Woffenden*, 243.
3. PROPERTY PURCHASED WITH PROCEEDS OF SALE OF WIFE'S SEPARATE PROPERTY becomes the separate property of the wife, and the rents and profits of her separate property are as absolutely hers, and as completely under her control, as is the property of which they are the fruits. *Woffenden v. Charauleau*, 346.

See COMMUNITY PROPERTY; HUSBAND AND WIFE; PLEADING AND PRACTICE, 18; SEPARATE PROPERTY.

MASTER AND SERVANT.

See NEGLIGENCE, 3.

MECHANICS' LIENS.

MECHANIC'S LIEN, WHAT SUBJECT TO SALE ON FORECLOSURE OF.—In a suit to foreclose a mechanic's lien, only the interest of the party who caused the building to be erected or the materials to be furnished can

be ordered sold for the extinguishment of the lien. *Breman v. Foreman*, 413.

MINERAL LANDS.

LAWS OF UNITED STATES RELATING TO ACQUISITION OF TITLE TO MINERAL LANDS on the public domain are paramount, and the laws of a state or territory, so far as they conflict therewith, are entirely nugatory. *Johnson v. McLaughlin*, 493.

MINING CLAIMS.

1. **WHEN LOCATION OF MINING CLAIM IS MADE FOR ABSENT LOCATOR**, whether with or without authority, or with or without his knowledge, whatever rights are given to him by such location vest in him at once, and even the person locating such absentee can not, without authority, take down the name of such absentee and insert another, even if he do it before the absent locator has knowledge of the fact that he has been located. No express authority is requisite for a person to locate an absent party. *Rush v. French*, 99.
2. **LAW AND CUSTOMS OF MINERS PERMIT LOCATIONS TO BE MADE FOR NON-RESIDENTS** of the district, and when so made, the title vests in the person for whom they are made. *Id.*
3. **FORFEITURE OF MINING CLAIM**.—A failure to comply with the local rules and customs of the miners of a district will not work a forfeiture of a mining claim, unless those rules and customs expressly declare that such failure shall work a forfeiture, and such local rules and customs, instead of being liberally construed to establish such forfeiture, will be strictly construed as against it. *Id.*
4. **LOCAL RULES AND CUSTOMS OF MINERS, INTERPRETATION OF**.—The local rules and customs of miners are subject to exactly the same rules of construction and interpretation as any other statute. *Id.*
5. **PARTY IN POSSESSION OF MINING CLAIM MAY HOLD SURFACE OF SAME** while he is continuously and industriously seeking a vein or lode believed to exist therein, as against all parties having no better right thereto, and may eject them therefrom if they intrude upon his possession. *Field v. Grey*, 404.
6. **OWNER OF MINING CLAIM CAN ONLY FOLLOW HIS VEIN OR LODE ON ITS DIP**, when the vein or lode dips substantially at right angles with the strike of the vein or lode. He can not follow the vein outside of his claim on the course or strike of the vein in any case. If the vein crosses the side lines on its strike, such side lines become the end lines, and terminate the owner's right to follow the vein in that direction. *Tombstone M. & M. Co. v. Way-up M. Co.*, 428.
7. **ORE BODIES FORMED OFF FROM AND CONNECTED WITH A FISSURE VEIN** do not form a separate vein, lode, ledge, or mineral deposit. *Id.*
8. **LOCATION OF MINING CLAIM RECORDED IN STRICT COMPLIANCE WITH LAWS OF UNITED STATES** and of the territory of Arizona, in the recorder's office of the proper county, is valid, although not recorded with, nor examined by, the local district recorder, in compliance with the local regulations of the mining district. *Johnson v. McLaughlin*, 493.
9. **FAILURE TO COMPLY WITH LOCAL REGULATIONS OF MINING DISTRICT DOES NOT WORK FORFEITURE** of a prior location, unless such regulations prescribe a forfeiture as the penalty of their non-observance. *Id.*

NEGLIGENCE.

1. ABSENCE OF FAULT ON PART OF PLAINTIFF, in an action to recover for personal injuries caused by the defendant's negligence, need not be averred or proved by him. *Lopez de Lopez v. Central Arizona Mining Co.*, 464.
2. PLAINTIFF IN SUCH ACTION CAN NOT RECOVER IF HIS OWN WANT OF CARE or negligence in any degree contributed to the result complained of. It is no defense, however, if the plaintiff's act might have contributed, or did contribute, to the injury. It must have been by his fault, not merely by his act. *Id.*
3. OWNER OF MINE WHO WORKS IT IN DANGEROUS BUT ONLY PRACTICABLE MANNER is not liable for injuries to an employee, caused by a fellow-servant in the course of the employment, if such employee had knowledge of the danger, unless the injury complained of resulted from the wrongful act, neglect, or default of the owner. *Id.*

NEGOTIABLE INSTRUMENTS.

See PLEADING AND PRACTICE, 2, 24, 37, 38.

NEW MATTER.

See EJECTMENT, 2; WITNESSES, 2.

NEW TRIAL.

1. NEW TRIAL IN DISTRICT COURT, WHEN GRANTED IN APPEAL FROM JUSTICE'S COURT.—Where the transcript on appeal is obscure or unintelligible, or where error prejudicial to the rights of a party appears on the face of the transcript, or by an assignment of errors by way of affidavit, sustained by the special return of the justice, relating thereto, the appellate court may modify the judgment, if the error be one which, upon inspection of the returns, can be so corrected, or may order a new trial when the error can not otherwise be reached. But if no such error appears either by reference to the transcript, or by assignment of error by way of affidavit, the district court must render such judgment as was had in the justice's court, with the costs of the appeal. *Irvine v. Lopez*, 81.
2. WHETHER APPELLATE COURT SHOULD GRANT NEW TRIAL FOR ERROR in admitting evidence of a parole agreement between the parties when a written agreement was alleged, unless it is plain from the whole case that a different result would be reached on a new trial, *quære*. *Tweed v. Lowe*, 488.

NOTICE.

NOTICE IS SUFFICIENT when it informs the party entitled to receive it of the thing to be done, and leads him to the place of doing it at the proper time. *Porter v. Bichard*, 87.

OBJECTIONS.

See PLEADING AND PRACTICE, 2, 6-9, 25, 29.

OFFICES AND OFFICERS.

NO OFFICER OF TERRITORIAL LEGISLATURE CAN BE ALLOWED ANY COMPENSATION for his services beyond that which is provided by the laws of the United States. *Osborn v. Clark*, 397.

PARTITION.

See Co-TENANCY.

PARTNERSHIP.

PARTNERSHIP AGREEMENT REDUCED TO WRITING, BUT NOT EXECUTED by the partners, is not evidence of the terms and conditions of the partnership. *Tweed v. Loue*, 488.

See PLEADING AND PRACTICE, 15, 24.

PLEADING AND PRACTICE.

1. CERTIFICATE OF PROBABLE CAUSE SHOULD NOT BE GIVEN BY COURT, where the facts in the case show no reasonable cause for making the seizure. *United States v. Richard & Co.*, 31.
2. OBJECTION THAT NOTE SUED ON WAS INSUFFICIENTLY STAMPED can not be raised for the first time in the supreme court. *Irvine v. Lopez*, 81.
3. CLERK HAS NO POWER TO ENTER JUDGMENT BY DEFAULT AFTER ANSWER has been filed, although such answer may be informal or insufficient. Any answer filed in the cause suspends the clerk's power to declare the defendant's default and to enter judgment, and its value as a pleading can be determined by the court only. *Porter v. Richard*, 87.
4. JUDGMENT BY DEFAULT ENTERED BY CLERK AFTER ANSWER FILED should be set aside by the court. *Id.*
5. VERIFICATION OF ANSWER DOES NOT IMPAIR ITS EFFECT as a pleading, although it is made in a case where the law does not require the answer to be verified. *Id.*
6. OBJECTIONS, WHAT THE RECORD MUST SHOW IN REFERENCE TO.—Where a party objecting is overruled and he appeals, he must show by the record: 1. What the question was and what answer was given to it, or what the evidence was which was introduced against his objection. 2. He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. 3. He must show what kind of an objection was made, and, to avail him in the supreme court, he must show that the objection, as made, was good. *Rush v. French*, 99.
7. *ID.*—Where the party objecting is sustained and the other side appeals, the appellant must show by the record: 1. What question he asked, and what evidence he sought to introduce. 2. Sufficient of the other evidence to illustrate the admissibility of that offered. 3. That the evidence so offered was excluded. 4. That there is reasonable ground to presume that he may have been injured by such exclusion. *Id.*
8. SUPREME COURT WILL CONSIDER ONLY SUCH GROUNDS OF OBJECTION as were urged in the court below. Such objection must be specific, not general. It is error to sustain a general objection, unless it is impossible that the evidence offered can be material in any view of the case, and this impossibility must be apparent. *Id.*
9. OBJECTION THAT TESTIMONY OFFERED IS IRRELEVANT, INADMISSIBLE, OR INCOMPETENT, without specifying wherein or how, or why it is irrelevant, inadmissible, or incompetent, will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant, admissible, or competent. *Id.*

10. IT IS NOT ERROR TO REFUSE INSTRUCTION HAVING NO RELEVANCY to any question involved in the issue. Whether or not it is error to give such an instruction depends upon whether it is calculated to mislead the jury or not. *Id.*
11. WHERE ERROR IS SHOWN, INJURY IS PRESUMED, unless the contrary plainly appears. *Id.*
12. LEGAL TERMS MUST NOT BE USED IN INSTRUCTIONS WITHOUT EXPLANATION. *Id.*
13. TO INSTRUCT JURY THAT THERE MUST BE PREPONDERANCE OF EVIDENCE in favor of a party to entitle him to a verdict is not error. *Campbell v. Shivers*, 161.
14. EXCEPTION MUST REFER TO SOME PORTION OF THE EVIDENCE in a case, in order to be of any avail to the party who makes it. *Id.*
15. WHERE TWO PERSONS DOING BUSINESS AS PARTNERS AGREE IN WRITING that, in case of the death of either of them, the survivor shall settle the business of the partnership, and after paying the just debts of the partnership and of the deceased, shall have all the remaining property of every kind for his sole use and benefit, without any process of law whatsoever, accounting only to the creditors of the partnership and of the deceased partner, a complaint filed, after the death of one of the parties, in the district court by the survivor, setting up the agreement and asking that the administrator of the deceased party be required to turn over to him all the property in his possession belonging to the estate of the deceased, and offering, on the part of the plaintiff, to perform all the terms and conditions of the agreement, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *Eldred v. Warner*, 175.
16. APPEAL DOES NOT LIE TO SUPREME COURT FROM JUDGMENT of a district court rendered by it on an appeal from a justice's court, when the amount of the judgment does not exceed two hundred dollars. *Grounds v. Ralph*, 227.
17. WHERE APPEAL IS FROM JUDGMENT ONLY, the judgment roll is the only thing that can be considered by this court, no matter how many other papers the clerk may choose to embody in the transcript. And if no error appear in the judgment roll, the appeal will be dismissed. *Id.*
18. COMPLAINT IN ACTION TO ENFORCE CONTRACT OF MARRIED WOMAN need not allege that she is of the age of twenty-one years or upwards. If the defendant is under that age, she may plead that fact as a matter of defense, but a failure to aver in the complaint that she is of that age is not ground for a general demurrer. *Miller v. Fisher*, 232.
19. COMPLAINT MERELY ALLEGING THAT DEFENDANT USED PERSONAL PROPERTY of the plaintiff with the latter's permission, and that such use is reasonably worth a sum claimed, does not state facts sufficient to constitute a cause of action, and a general demurrer thereto is properly sustained. *Davis v. Breon*, 240.
20. PARTIES TO ACTION CAN NOT STIPULATE WHAT THE LAW IS that is to govern their case; nor can they stipulate what the action of a law-making body was in a given case, and from the stipulation thus made ask the court to determine whether a general law is or is not in force. *Graves v. Alsap*, 274.

21. FILING OF ANSWER WILL NOT BE PERMITTED AFTER DEFAULT, unless the defendant satisfies the court, in some way, that there is reasonable ground to presume that he has a valid defense to the action. *United States v. Barnard*, 319.
22. IT IS NOT ERROR FOR COURT TO INSTRUCT JURY upon their returning into court and asking for further instructions, although defendant's counsel is not at the time present, provided the defendant himself is present. *Torque v. Carrillo*, 336.
23. VERDICT OF JURY MAY BE RECEIVED IN ABSENCE OF COUNSEL for the defendant. *Id.*
24. IN ACTION AGAINST SURVIVOR OF TWO MAKERS OF PROMISSORY NOTE, after evidence that a partnership existed between them has been introduced, it is not error for the court to instruct the jury that if they believe that the defendant had been notified that such note was out, signed by himself and the deceased, and that when called on to pay the note he did not deny the authority of the deceased to make it, but on the contrary, promised to pay the same, then the defendant is liable on the note. *Murphy v. Willow*, 340.
25. WHERE PARTY INTRODUCES TESTIMONY, HE CAN NOT AFTERWARDS OBJECT TO IT on the ground that it is irrelevant. Nor can he object to the court's instructing the jury in reference to it, for if it is really irrelevant, there is all the more reason why the court should comment upon it so far as to prevent the jury from being misled by it. *Id.*
26. MANNER IN WHICH JUDGE DELIVERED HIS CHARGE TO THE JURY will not be considered on appeal to this court, unless it was made a ground of the motion for a new trial, and was supported by affidavit. *Id.*
27. UNLESS NOTICE OF APPEAL IS FILED WITHIN ONE YEAR from the date of the rendition of the judgment appealed from, the appeal will not be entertained by the supreme court. *Fleury v. Jackson*, 361.
28. APPEAL FROM ORDER DENYING NEW TRIAL CAN NOT BE SUSTAINED when the order from which the appeal is taken is not brought before this court in the record. *Id.*
29. OBJECTION THAT SPECIAL ISSUES SUBMITTED TO JURY did not cover all the issues in the case can not be taken for the first time in the supreme court. *Sandford v. Moeller*, 362.
30. UNLESS STATUTORY REQUIREMENTS RELATING TO STATEMENT ON APPEAL ARE COMPLIED WITH, such statement will not be noticed on appeal, and the right to present such statement will be deemed to have been waived. *Id.*
31. BILL OF EXCEPTIONS MUST ACCOMPANY THE TRANSCRIPT in all cases of appeal. *Territory v. Selden*, 381.
32. APPEALS FROM JUSTICE'S COURT TO DISTRICT COURT MUST BE PERFECTED within thirty days from the rendition of the judgment. The provisions of the statute providing for such appeals are mandatory. *Zeckendorf v. Zeckendorf*, 401.
33. MERE NON-APPEARANCE OF FINDINGS OF FACT IN THE RECORD ON APPEAL is not sufficient to show that error was committed at the trial. *Lount v. Lount*, 422.
34. ERROR WILL NOT BE PRESUMED, but must be affirmatively shown. *Id.*
35. APPELLATE COURT WILL NOT DISTURB FINDINGS OF FACT BY TRIAL COURT, where there is substantial evidence to sustain them, unless errors of law

- have occurred, requiring a reversal. *Tombstone Mill and Mining Co. v. Way-up Mining Co.*, 428.
36. DEFENDANT IN DEMURRING TO COMPLAINT FOR FAILURE TO STATE FACTS SUFFICIENT to constitute a cause of action, and specifying in his demurrer certain grounds of insufficiency, can only rely upon the defects specified. It is otherwise if the demurrer is general, and without specification. *Lopez de Lopez v. Central Arizona Mining Co.*, 464.
 37. CAUSES OF ACTION, STATEMENT OF.—In an action on several bills of exchange, all bearing the same date, payable to the same party, due at the same time, the better practice is for the complaint to contain a separate statement on each bill. If, however, the complaint contains but a single statement, an order overruling a demurrer thereto will not be disturbed. *Dawson v. Lail*, 490.
 38. COSTS OF PROTEST OF INLAND BILL.—The allowance of costs for the protest of inland bills of exchange is not reviewable on appeal, when no motion to retax costs was made in the lower court. *Id.*
 39. JUDGMENT FOR PLAINTIFF ON THE PLEADINGS can not be rendered when the answer denies any of the material allegations of the complaint, or sets up new matter constituting a defense. *Miles v. McCallan*, 491.
 40. FINDINGS SHOULD BE CONFINED TO CONTESTED FACTS and determined from the evidence. Findings as to facts admitted by the pleadings are unnecessary. *Id.*
 41. ADMINISTRATOR MAY MAINTAIN POSSESSORY ACTION to recover real estate of his intestate, to the possession of which the law gives him the right, without alleging in his complaint any possession or right of possession in the intestate. *Oury v. Duffield*, 509.
 42. ERROR MUST BE AFFIRMATIVELY SHOWN in order to justify an appellate court in reversing a judgment. *Federico v. Hancock*, 511.
 43. APPELLATE COURT CAN NOT DETERMINE WHETHER FINDING IS SUSTAINED by the evidence or not, where the record on appeal contains none of the evidence. *Id.*
 44. FINDINGS ARE CONCLUSIVE AS TO THE FACTS, when no motion for a new trial has been made. *Id.*
 45. PARTY ALLEGING ERROR MUST POINT OUT SPECIFICALLY in what the error consists, and wherein it occurred. A general allegation of error is never sufficient. *Id.*
 46. EXCEPTIONS MUST BE TAKEN AT TRIAL IN COURT BELOW, or they can not be regarded by the supreme court. *Id.*
- See CRIMINAL LAW; EJECTMENT, 2; EQUITY; HABEAS CORPUS; JUDGMENTS; NEGLIGENCE, 1, 2.

POSSESSORY RIGHTS.

See EJECTMENT, 1; PUBLIC LANDS, 1.

PRESUMPTIONS.

- PRESUMPTION IN FAVOR OF REGULARITY OF ORDER OF COURT does not arise in a case where the order is made in a matter over which the court has no jurisdiction. *Territory v. Mix*, 52.
- See ADMINISTRATORS; COMMUNITY PROPERTY; CRIMINAL LAW, 7; PLEADING AND PRACTICE, 11, 21, 34.

PROBABLE CAUSE.

See PLEADING AND PRACTICE, 1.

PROBATE COURTS.

1. NO APPEAL LIES FROM PROBATE COURT DIRECTLY TO SUPREME COURT.
All appeals from the probate court must be taken to the district court.
Estate of Roldick, 411.

2. DISTRICT COURTS HAVE NO POWER TO APPOINT ADMINISTRATORS of estates of deceased persons. In probate matters their jurisdiction is purely appellate. The power to appoint administrators belongs exclusively to the probate courts. *Territory v. Miz*, 52.

See JURISDICTION, 1.

PUBLIC LANDS.

1. ESSENTIAL LEGAL REQUISITES OF POSSESSORY RIGHT TO PUBLIC LANDS in Arizona, are the intention of the settler to permanently occupy and improve them for his home, and the manifestation of that intention, as early as practicable, by such improvements and badges of ownership as make it known to others. And any settlement, cultivation, or improvement, in pursuance of this intention, is sufficient to secure this right to the occupant, and to enable him to maintain ejectment against any one who disturbs him therein. *Davis v. Simmons*, 25.

2. FACT THAT TRACT OF LAND CLAIMED BY SETTLER IS ONE MILE LONG, and only one fourth of a mile in width, does not invalidate his claim, or justify another in appropriating any portion of it. *Id.*

3. OFFER OF CLAIMANT OF LAND TO BUY HIS PEACE is not, if rejected, the surrender of any legal advantage, or the admission of an adverse claim. *Id.*

RAPE.

See CRIMINAL LAW, 14, 15.

RECEIVERS.

See ESTATES OF DECEASED PERSONS.

RECORDING.

See MINING CLAIMS, 8.

SEPARATE PROPERTY.

RENTS AND PROFITS OF WIFE'S SEPARATE PROPERTY are her separate property, and if she invests them in the purchase of other property, the property so purchased will be separate property, under her sole and exclusive control. *Charauleau v. Woffenden*, 243.

See MARRIED WOMEN.

STATEMENT ON APPEAL.

See PLEADING AND PRACTICE, 30.

STATUTE OF LIMITATIONS.

See ADVERSE POSSESSION,

STATUTES.

See EVIDENCE, 1.

STIPULATION.

See PLEADING AND PRACTICE, 20.

TERMS OF COURT.

See COURTS, 2.

TERRITORIAL COURTS.

See COURTS, 1.

TITLE.

See DEEDS, 2; EJECTMENT, 2; EVIDENCE, 3; MINERAL LANDS; MINING CLAIMS, 2.

VERDICT.

See CRIMINAL LAW, 6, 8; JURY AND JURORS; PLEADING AND PRACTICE, 23.

VERIFICATION OF PLEADING.

See PLEADING AND PRACTICE, 5.

WITNESSES.

1. PERSON NOT AN EXPERT MAY TESTIFY AS TO EFFECT OF LIQUOR upon a particular person with whom he is acquainted. *Cole v. Bean*, 377.
2. CROSS-EXAMINATION, LIMITS OF.—1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except upon exclusively new matter; and nothing is deemed new matter except such as could not be given under a general denial. 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim, affords no reason why it should be excluded. 3. The party entitled to cross-examine may waive his right to do so at the time, and recall the witness and cross-examine him after he opens his case. 4. The court, in its discretion, may forbid the cross-examining party putting leading questions, when the objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is well founded. *Rush v. French*, 99.



